RECORD, CASE NO. 14202.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 211.

JOEL B. ERHARDT, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

FREDERICK A. SCHROEDER, ISIDORE M. BON, EDWIN A. SCHROEDER, AND WILLIAM J. HAZLEWOOD, COMPOSING THE FIRM OF SCHROEDER & BON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Notice of appearance and demand	5	2
Writ of certiorari	7	3
Complaint	9	3
Bill of particulars	14	5
Answer	16	5
Minutes of trial, etc	18	7
Judgment	20	8
Bill of exceptions	22	8
Entry and invoice	23	9
Withdrawal entries	28	12
Protest January 29, 1889	30	12
Statement of evidence	35	14

	Original.	Print.
Bill of exceptions—Continued.		
Testimony of George G. Hammill	37	15
Frederick A. Schroeder	39	16
Frederick A. Wagenfuehr	47	20
William Roberts	48	20
Peter Mackin	48	20
Simon Henry	49	21
Decision of Treasury Department, August 1, 1887	50	21
Decision of Treasury Department, June 20, 1887	55	23
Decision of Treasury Department, February 3, 1886	57	24
Testimony of Frederick A. Schroeder (recalled)	58	25
Frederick W. Brooks	59	25
George G. Hammill (recalled)	60	26
Abraham S. Goff	61	26
Edgar M. Crawford	61	26
Amasa H. Scoville	64	27
Defendants' requests refused	66	28
Plaintiff's request granted	67	29
Judge's certificate to bill of exceptions	68	29
Assignment of errors	69	30
Citation	71	30
Proof of service of citation	72	31

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Frederick A. Schroeder, Isidore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of Schroeder and Bon, plaintiffs, and Joel B. Erhardt, defendant, a manifest error hath happened to the great damage of the said Joel B. Erhardt, plaintiff in error, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of June, in the year of our Lord one thousand eight hundred and ninety.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from 3 to 72 inclusive, contain a true and complete transcript of the records and proceedings had in said court, in the case of Joel B. Erhardt, plaintiff in error, against Frederick A. Schroeder, Isidore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord, one thousand eight hundred and ninety and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed;) U. S. Supreme Court. Joel B. Erhardt, plaintiff in error, against Frederick A. Schroeder & als., defendants in error. Writ of error. Edward Mitchell, U. S. attorney, att'y, attorney for plaintiff in

error. Due service of a copy of the within writ of error is hereby admitted this 24 day of June, 1890. Wm. B. Hill, attorney for defendants in error. E. & A. A. 14092. U. S. circuit court. Filed June 24, 1890. John A. Shields, clerk.

3 Superior court of the city of New York.

Summons.

FREDERICK A. SCHROEDER, ISIDORE M. BON, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of Schroeder & Bon,
against
JOEL B. ERHARDT, COLLECTOR.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated May 6, 1889.

WILLIAM B. HILL,
Plaintiff's Attorneys.
Office and post-office address, No. 189 Montague st., Brooklyn.

4 (Indorsed:) 14092. Superior court of the city of New York. Frederick A. Schroeder, Isidore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of Schroeder and Bon, against Joel B. Erhardt. Summons. William B. Hill, plffs' attorney, 189 Montague st., Brooklyn, N.Y. Personally served, May 7, 1889. Custom-house, New York.

5 N. Y. superior court.

Notice of appearance and demand.

FREDERICK A. SCHROEDER & ALS.
versus
JOEL B. ERHARDT.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a bill of particulars of the plaintiffs' claim herein, and a copy of the complaint and all papers in this action upon me, at my office in the United States court and post-office building, in the city of New York.

Yours,

STEPHEN A. WALKER,
United States Attorney, attorney for Defendant.

NEW YORK, May 18, 1889.
To WM. B. HILL,
Attorney for Plaintiff.

6 (Indorsed:) 14092. N. Y. superior court. Frederick A. Schroeder & als. versus Joel B. Erhardt. Notice of appearance. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within notice is hereby admitted. Dated the day of , 1890. Plaintiff's attorney. To Wm. B. Hill, plaintiff's attorney.

7 The President of the United States of America, to the judges of the Superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Joel B. Erhardt, defendant, by Frederick Schroeder & als., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 5 day of June, 1889, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 1 day of June, in the year one thousand eight hundred and eighty-nine.

[L. S.] JOHN A. SHIELDS,
Clerk.

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

8 (Indorsed:) 14092. U. S. circuit court. Frederick A. Schroeder & als. vs. Joel B. Erhardt. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, June 1, 1889. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant; to W. B. H., plaintiffs' attorney. Due service of a copy of the within, and of the above notice is hereby admitted. New York, June 1, 1889 Plaintiffs' attorney.

9 Circuit court of the United States for the southern district of New York.

Complaint.

FREDERICK A. SCHROEDER, ISIDORE M. BON, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of Schroeder & Bon, plaintiffs,
against
JOEL B. ERHARDT, DEFENDANT.

The complaint of the plaintiffs respectfully shows:

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade under the firm name of Schroeder and Bon, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

10 3d. The defendant, as such collector, exacted from plaintiffs as and for duties thereon, and plaintiffs, in order to obtain said goods, were compelled to pay and did pay the sum of thirty-two thousand and forty and 60/100 (32,040 60/100) dollars, in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each
11 importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of said protests, of the appeal to the Secretary of the Treasury and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for thirty-two thousand and forty and 60/100 (32,040 60/100) dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

WILLIAM B. HILL,
Attorney for Plaintiff.

(Endorsed:) 14092. United States circuit court, southern district of New York. Frederick A. Schroeder, Isidore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of
13 Schroeder and Bon, against Joel B. Erhardt. Complaint. To S. A. W., esq., deft. atty. A copy of the within paper has been this day received at this office, Jun. 6, 1889. Stephen A. Walker, U. S. attorney. William B. Hill, plaintiffs' attorney, 189 Montague st., Brooklyn, N. Y.

Bill of particulars.

[Name of importer (for all importations), Schroeder and Bon.]

	Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom house.	Amount of duty illegally exacted in excess.	Date of payment of duties in excess.	Date of filing protest.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
1	Leaf tobacco.....	Amsterdam.....	Amsterdam.....	July 6, 1888	July 20, 1888	$2,449.60	1888. Aug. 1, 24, 31; Sept. 7, 17, 24, 27; Oct. 3, 6, 15; Dec. 17.	Oct. 20, 1888	Oct. 20, 1888	March 29, 1889
2	Leaf tobacco.....	Amsterdam.....	Zaandam	July 27, 1888	Aug. 11, 1888	68.80	1889. March 19	Sept. 6, 1888	Sept. 6, 1888	Dec. 27, 1888
3	Leaf tobacco.....	Amsterdam.....	Leerdam.....	Aug. 4, 1888	Aug. 20, 1888	1,132.00	1888. Sept. 17, 18, 26; Oct. 6, 8, 13, 19; Nov. 2, 9, 26.	Oct. 22, 1888	Oct. 22, 1888	March 29, 1889
4	Leaf tobacco.....	Amsterdam.....	Edam.....	Aug. 13, 1888	Aug. 27, 1888	1,356.40	1888. Sept. 7, 17; Oct. 8, 13, 17; Nov. 2; Dec. 8; 1889, Jan. 2, 7.	Oct. 8, 1888	Oct. 8, 1888	Jan. 30, '89
5	Leaf tobacco.....	Amsterdam.....	Amsterdam.....	Aug. 17, 1888	Sept. 1, 1888	1,905.20	1888. Oct. 2; Nov. 14, 24; Dec. 11, 1889, Jan. 10, 12, 24; Mar. 1; May 8.	Oct. 22, 1888	Oct. 22, 1888	Mar. 29, '89
6	Leaf tobacco.....	Amsterdam.....	Zaandam	Oct. 19, 1888	Nov. 5, 1888	23,193.60	1888. Nov. 9, 13, 16, 20, 21, 27, 28; Dec. 1, 5, 6, 10, 12, 18, 28, 31. 1889. Jan. 5, 7, 10, 14, 15, 21, 25, 31; Feb. 1, 12, 13, 25, 28; Mar. 2, 12, 19, 25; Apr. 2, 24; May 3, 6, 7, 16, & 18.	Jan. 29, '89	Jan. 29, 1889	Apr. 3, '89
7	Leaf tobacco.....	Amsterdam.....	P. Caland.....	Jan. 12, 1889	Jan. 28, '89	1,845.00	1889. Feb. 1, 4, 6, 9, 12, 15, 16, 19, 21, 26; Mar. 11; Apr. 16.	Mar. 13, '89	Mar. 13, '89	May 8, '89
						31,990.60				

15 (Indorsed :) 14092. U. S. circuit court, southern district of New York. Frederick A. Schroeder, Isidore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of Schroeder & Bon, against Joel B. Erhardt. Copy bill of particulars. Brooklyn, N. Y., June 6, 1889. To Stephen A. Walker, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant as collector of customs at the port of New York, and the within is the plaintiffs' bill of particulars. William B. Hill, plaintiffs' attorney, 189 Montague st., Brooklyn, N. Y.

16 Circuit court of the United States for the southern district of New York.

FREDERICK A. SCHROEDER ET AL.
versus
JOEL B. ERHARDT, COLLECTOR, ETC. } N. S. 14092.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint, was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And further answering he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon, or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And further answering the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the

complaint alleged to have been made, were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And further answering the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

17 Indorsed:) 14092. U. S. circuit court, southern district of New York. Frederick A. Schroeder et al. vs. Joel B. Erhardt, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. SIRS: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, Aug. 27, 1889. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't, to Wm. B. Hill, esq., attorneys for plaintiffs. Rec'd Aug. 29, '89, 9 a. m.

18 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Thursday, the 9th day of January, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable E. Henry Lacombe, circuit judge.

FREDERICK A. SCHROEDER ET AL.
vs.
JOEL B. ERHARDT.
} N. S. 14092.

Now come the plaintiffs, by William C. Stanley, esq., their attorney, and move the trial of this cause.

Likewise comes the defendant, by William Wickham Smith, esq., assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the respective parties, and the argument of counsel, the jury, on the 14th instant, by direction of the court, say that they find a verdict for the plaintiffs in the sum of seven hundred and eight dollars and twelve cents ($708.12).

On motion of William Wickham Smith, ordered that the defendant have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

19 On like motion, ordered that a certificate of probable cause be granted.

An abstract of the minutes.

[L. S.] JOHN A. SHIELDS,
Clerk.

20 U. S. circuit court, southern district of New York.

Judgment.

FREDERICK A. SCHROEDER ET AL.
vs.
JOEL B. ERHARDT. } N. S. 14092.

This cause having been brought on for trial before the Hon. E. Henry Lacombe and a jury on the 9th day of January, 1890, and a verdict having thereafter been rendered by the jury under the direction of the court, for the plaintiffs in the sum of seven hundred and eight dollars and twelve cents ($708.12), and the costs having thereafter been adjusted in the sum of fifty-one dollars and eighty-five cents ($51.85),

Now, on motion of William B. Hill, attorney for the plaintiffs,

It is adjudged that the plaintiffs, Frederick A. Schroeder, Isadore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, do recover of and have judgment against the defendant, Joel B. Erhardt, for the sum of seven hundred and eight dollars and twelve cents ($708.12), with interest thereon from the 14th day of January, 1890, amounting to $19.00, together with the sum of fifty-one dollars and eighty-five cents ($51.85) costs, making in all the sum of seven hundred and seventy-eight dollars and ninety-seven cents ($778.97), and have execution therefor.

Judgment signed this 20th day of June, A. D. 1890.

JOHN A. SHIELDS,
Clerk.

21 (Endorsed:) N. S. 14092. U. S. circuit court, southern district of New York. Frederick A. Schroeder et al. vs. Joel B. Erhardt. Judgment roll. Wm. B. Hill, attorney for plaintiff, 52 Wall street, N. Y. City. U. S. circuit court. Filed June 20, 3 p. m., 1890. John A. Shields, clerk.

22 United States circuit court, southern district of New York.

FREDERICK A. SCHROEDER ET AL.
vs.
JOEL B. ERHARDT. } N. S. 14092.

Defendant's bill of exceptions.

Afterwards, to wit, on the ninth day of January, 1890, the issues in this case came on for trial before the honorable E. Henry Lacombe, circuit judge, and a jury duly empanelled to try the same.

The plaintiffs were represented by W. B. Hill, attorney, and by William Stanley, Stephen G. Clarke, and Edwin B. Smith, of counsel.

The defendant was represented by Edward Mitchell, United States attorney, and his assistants, Henry C. Platt and William Wickham Smith.

To maintain the issues on their part plaintiffs proved that on the 5th day of November, 1888, they imported into the United States from Amsterdam, and made entry at the port of New York, of four hundred and twenty-nine bales of Sumatra tobacco, which they entered for warehouse. The following is a copy of the entry and of the invoice on which the entry was mode:

23 [Invoice dated Amsterdam, Oct. 19, 1888.]

Entry of merchandise imported on the 5th day of Nov., 1888, by Schroeder & Bon, in the Zaandam from Amsterdam, New York, Nov. 5th, 1888.

Marks.	Nos.	Packages and contents.	Dep.	Per lb.	Total.	Dutiable value of each package.
B.	1457 / 1885	(429) Four hundred & twenty-nine bales, 77,185 lbs., leaf tobacco, 184,157.86 fl., at 40%			74,031	$173.00

35513–75 Dep. 26634.75
41672–75 31254.00

57888.75 C.

In. 57888.75

Amend.
15230 35 5330.50
61471 75 46103.25

51433.75

A. L. E.

JAN. 24, '89.

D. D.

C. N. 7.

24 AMSTERDAM, *October* 19, 188 .

Invoice of B. $\frac{1457}{1885}$ — 429 bales Sumatra tobacco, shipped by S. S. Zaandam to Messrs. Schroeder & Bon, New York, for their risk and account.

Gross ..... 36,727 kg.
Fare 1,716

Net..... 35,011 kg., a. 263 cs., p. ½ k° free on board. fl. 18,157.86.

(Across face in ink:) Leaf tobacco *not* stemmed, 75%, 35%, tar. 246 & 247. T. Inew. See specification.

COLL'R: Please send the following bales to U. S. public stores, twenty-five bales:

B	
#	
1460	1624 :
1560	1632 :
1660	1775 :
1760	1679 :
1860	1706 :
1467	1794 :
1478	1826 :
1481	1850 :
1504	1869 :
1513	:
1518	:
1522	;
1524	:
1534	:
1539	:
1561	:
1571	:
1574	:
1583	:
1590	:
1594	:

B		
	B	1467 1794
		1478 1826
		1481 1850
	1480	1505 1869
	1560	1513
	1660	1518
	1760	1522
	1860	1524
		1534
		1539
		1561
		1571
		1574
		1583
		1590
		1594
		1624
		1632
		1775
		1679
		1706

Thirty bales as noted, balance classified, Nov. 19,/88.
G. C. H.
Appraised.
JAMES MCMULLEN,
Appraiser.

25 NEW YORK, *Oct.* 29, 1888.

Specification of 429 *bales per S. S. Zaandam.*

				35¢		
B 1457/66	10	bales	Deli par	247	T. I. new	A. 1.
			50%	247		35¢.
" 1467/77	11	"	50%	246		75¢ A. 1.
			80%	247		35¢.
" 1478/80	3	"	20%	246		75¢ J. A. 1.
			60%	247		35¢.
" 1481/1503	23	"	40%	246		75¢ C. 1.
			30%	247		35¢.
" 1504/12	9	"	70%	246		75¢ C. 1.
" 1513/17	5	"	60%	247		35¢ B. 1.
" 1518/21	4	"	40%	247		75¢ B. B. 1.
" 1522/23	2	"				S. D. 1.
" 1524/33	10	"				S. B. 1.

Specification of 429 bales per S. S. Zaandam—Continued.

					75¢		
B	1534/38	5	bales	Par	246	T. I. new	S. C. 1.
"	1539/44	6	"				C. C. 1.
"	1545/60	16	"				C. C. 1.
				30% p	247	T. I. new	35¢.
"	1561/70	10	"	70%	246		75¢ C. 1.
"	1571/73	3	"				B. B. 1.
							75¢
"	1574/82	9	"	p.	246	T. I. new	C. C. 1.
"	1585/89	7	"				E. 1.
				"	247		35¢.
"	1590/93	4	"				A. 1.
				50%	247		35¢.
"	1594/1623	30	"	50%	246		75¢ S. A. 1.
				30%	247		35¢.
"	1624/31	8	"	70%	246		75¢ C. 1.
"	1632/58	27	"				B. 1.
"	1659/78	20	"				C. C. 1.
"	1679/1705	27	"				S. C. 1.
							75¢
"	1706/54	49	"	par	246	T. I. new	S. B.
"	1755/74	20	"				E. 1.
	1775/93	19	"				C. C. 1.
	Forward	331	bales.				
26	B Forward,	337	bales, Deli.				
	" 1794/1825	32	" "				E. 1.
					75¢		
	" 1826/49	24	" "				I. 1.
					246	T. I. new.	
	" 1850/54	5	"			"	S. B. 1.
				40%	246	T. I. new	35¢.
	" 1855/68	14	"			"	75¢ D. 1.
				60%	246	" " "	
	" 1869/85	17	"	I. & R. 1 Deli.			B. 1.
				216 T. I. new.			
		429	bales.				

SCHROEDER & BON.

27 That on the 6th day of May, 1889, they withdrew from warehouse five of said bales, upon four of which they paid a duty of 75 cents a pound, and upon the fifth they paid a duty of 75 cents a pound on 125 pounds of the tobacco in the bale and 35 cents a pound upon 54 pounds of such tobacco; that on the 7th day of May, 1889, they with-

drew five more bales of the tobacco, upon all of which they paid duty at the rate of 75 cents per pound. The following are copies of the withdrawal entries:

28 [Form 9. Withdrawal. Bond 29746, book , page .]

NEW YORK, *May 7th, 1889.*

Entry of merchandise intended to be withdrawn from warehouse by Schroeder & Bon, which was imported into this district on Nov. 5, 1889, by Schroeder & Bon, in the Zaandam, from Adam.

Marks.	Nos. out.	Packages & contents of.	Quantities, 75c.. lbs.	Total.	Dutiable value of each package.
B.	1623 1854	Five bales leaf tobacco.....	894	$865	

29 [Form 9. Withdrawal. Bond 29746, book ,page .]

NEW YORK, *May 6, 1889.*

Entry of merchandise intended to be withdrawn from warehouse by Schroeder & Bon, which was imported into this district on Nov. 5, 1888, by Schroeder & Bon, in the Zaandam, from Amsterdam.

Marks.	Nos. out.	Packages & contents.	Quantities, 75 35.	Total.	Dutiable value of each package.
B.	1522/60 1561 .70	Four bales leaf..... One tobacco	715 125. 54 840 lb . 54 lbs.	....	..... $173. 00

30 That their warehouse entry was liquidated upon the 25th day of January, 1889, and that within ten days after such liquidation they served upon the collector of the port a protest against his decision as to the rate and amount of duty exacted upon their goods, in which protest, among other things, they alleged that there had been no legal appraisal of said tobacco; that the provisions of section 2939 of the Revised Statutes of the United States had not been complied with. The following is a copy of the protest:

"NEW YORK, *Jan.* 29, 1889.

Hon. DANIEL MAGONE,
Collector of Customs, New York:

SIR: We hereby protest against your decision, assessment, and liquidation of duties as made by you in our importation below mentioned of certain leaf tobacco, not stemmed, upon the following grounds, and upon each of them separately:

First. We protest against the estimate of quantity of the different grades of said tobacco as made by the appraiser, and the assessment of 75 cents per pound as made by you as unlawful and as not in accordance with the provisions of Schedule "F" of the act of March 3rd, 1883, claiming said tobacco to be dutiable under said provision at only 35 cents per pound,

because eighty-five per cent of said leaf tobacco is not of the requisite
31 size and of the necessary fineness to be suitable for wrappers, and less than one hundred leaves are required to weigh a pound.

Second. We claim that in ascertaining the grade of the raw tobacco for purpose of classification the leaf should be taken as the unit of quantity, and that where less than eighty-five per cent of each leaf is of the necessary fineness of texture to be suitable for wrappers then such leaf is dutiable at 35 cents per pound.

Third. We claim that in ascertaining the grade of said tobacco for purpose of classification the hand should be taken as the unit of quantity, and that where less than eighty-five per cent of leaf in the hand is of the requisite size and of the neccessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such hand of tobacco is dutiable at only 35 cents per pound, as provided in Schedule "F" of the act of 1883 (par. 247), claiming said tobacco to be under said limit.

Fourth. That in ascertaining the grade of said tobacco for purpose of classification the bale should be taken as the unit of quantity, and where the bales do not contain eighty-five per cent of hands of the necessary fineness and lightness, as aforesaid, then the whole bale is dutiable at only 35 cents per pound, under Schedule "F," act March 3rd, 1883 (par. 247).

Fifth. That in ascertaining the grade of said tobacco for purpose of classification the bale should be taken as the unit of quantity, and
32 that where less than eighty-five per cent of the bale is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such bale of tobacco is dutiable at only 35 cents per pound, as provided in Schedule "F," act March 3rd, 1883 (par. 247), claiming said tobacco to be under such limit.

Sixth. That in ascertaining the grade of said tobacco for purpose of classification the invoice quantity should be taken as the unit of quantity, and that where less than eighty-five per cent of the invoice quantity is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such invoice quantity of tobacco is dutiable at only 35 cents per pound, as provided in Schedule "F" (par. 247) of act of March 3rd, 1883, claiming said tobacco to be under such limit.

Seventh. That in the absence of actual weight, ascertained in the legal manner, said tobacco is chargeable under Schedule "F," act of March 3rd, 1883, at no more than 25 cents per pound, because eighty-five per cent of the U. S. weigher's return of said tobacco is not of the requisite size and necessary fineness of texture to be suitable for wrappers, and that less than one hundred leaves are required to weigh a pound.

Eighth. That if it be held that the leaf is the legal unit of quantity, then, if there is not eighty-five per cent of any one leaf of the
33 necessary fineness of texture and lightness, as aforesaid, the whole bale is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under such limit.

Ninth. That if it be held that the hand is the legal unit of quantity, then if there is not eight'-five per cent of hands which contains eight'-five

per cent of leaf of the requisite size, texture, and lightness, as aforesaid, in a bale the whole bale is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under said limit.

Tenth. That if it be held that the bale is the legal unit of quantity, then if there is not eight-five per cent of the bale in an invoice which contains eighty-five per cent of leaf of the requisite size, texture, and lightness, as aforesaid, the whole invoice quantity is dutiable at no more than 35 cents per pound, and we claim that said tobacco is under said limit.

Eleventh. We further claim that there has been no legal appraisal of said tobacco; that the provision of section 2939 U. S. Revised Statutes have not been complied with.

Twelfth. That the respective rates of duties have not been assessed upon weights legally ascertained, in that the provisions of section 2890 U. S. Revised Statutes have not been complied with; the duty of 75 cents per pound having been made upon an estimated weight made by the U. S. appraiser instead of upon the actual quantity ascertained by the U. S. weighers, as provided by law.

34 Thirteenth. That the standard grade of said tobacco, ascertained in accordance with commercial usage, is less than the limitation specified in Schedule "F," act March 3rd, 1883 (par. 246), and is, therefore, dutiable at only 35 cents per pound, as provided under par. 247 of said schedule and act.

Fourteenth. We therefore give notice that we pay all other higher rates than is claimed above as legal rate under compulsion, and to obtain possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refunding of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all further similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision, and to likewise apply to all future similar importations by us.

35 Importation referred to in foregoing protest and appeal:
Description of goods, leaf tobacco.
Name of importer, Schroeder & Bon.
Whence imported, Amsterdam.
Name of vessel, Zaandam.
Date of entry, Nov. 5, 1888.
Date of liquidation, Jan. 25, 1889.
Number of entry.
71,412 lbs. net. 398 bales numbered B. 1467–1589–1594–1868.
Liquidated duty, $49,582.60.

They further proved that within thirty days from the liquidation of the entry they had duly appealed to the Secretary of the Treasury, in which appeal they had alleged that there had been no legal appraisal of said tobacco, and that the provisions of section 2939, U. S. Revised Statutes, had not been complied with, and that the Secretary having decided against them on appeal, they had within ninety days after his decision brought suit to recover the duties alleged to have been erroneously exacted. Defendant became collector on the 6th day of May, 1889, and the duties on the other items in the invoice were paid to his predecessor.

The ten bales upon which plaintiffs alleged the duties to have been erroneously exacted and claimed to recover in this suit were upon the invoice numbered respectively. Plaintiffs gave evidence tending to show
36 that they were required by the collector to enter the tobacco at 75 cents instead of 35 cents a pound and deposit a duty of 75 cents a pound, and that they did so in order to get possession of the tobacco; 1526, 1527, 1528, 1529, 1564, 1771, 1772, 1773, 1774, 1689.

Annexed to the invoice was a statement made by the importers of the various plantation lots to which the 429 bales covered by the invoice belonged, giving for each lot the numbers of the bales included in such lot. From this statement it appeared that bales 1524 to 1,533, both inclusive, belonged to the plantation lot designated upon such statement by the mark S. B. 1; that bales 1561 to 1570, both inclusive, belonged to plantation lot C. 1; that bales 1755 to 1774, both inclusive, belonged to plantation lot E. 1, and that bales 1679 to 1705, both inclusive, belonged to plantation lot S. C. 1.

From the invoice and the testimony of the examiner of tobacco at the appraiser's stores, called as a witness for the plaintiffs, it appeared that upon the entry of the tobacco the collector had designated five bales for examination at the public stores; that subsequently, upon the request of the appraiser, twenty-five additional bales and no more had been sent to the public stores for examination; that of the plantation lot designated by the mark S. B. 1, bale numbered 1524 had been examined at the public stores; that of the plantation lot designated by the mark C. 1, bale numbered 1564 had been examined at the public stores; that of the
37 plantation lot designated by the mark E. 1, bale 1760 had been examined at the public stores, and that of the plantation lot designated by the mark S. C. 1, bale 1679 had been examined at the public stores.

Plaintiff's counsel then called as a witness GEORGE G. HAMILL, who, having been sworn, testified as follows:

I am and in 1888 was an examiner of tobacco in the public stores. The invoice in this case came to me for classification of the tobacco referred to in it. Of the thirty bales of the invoice in question in the public stores what I did was this: I opened, for instance, No. 1760; drew out ten hands promiscuously from the bales; weighed each hand separately, and set the weight of each down separately on a piece of paper. I then counted the leaves of each hand and put the number down opposite the weight. There are 7,000 grains in a pound. If there were just 100

leaves in a pound, each leaf would weigh just 70 grains, therefore by dividing the weight of the hand by the number of leaves in the hand, if the quotient was just seventy or less, then that would prove that there was in that hand just one hundred leaves or less, and I would classify that hand in that event at 35 cents, and set 35 down on the paper opposite to the figures on the paper, stating the number of leaves in the hand. That hand I would treat as dutiable at 35 cents. If the quotient resulting from the division of the weight of the hand by the number of leaves in it was over seventy, then that showed that there were over one
38 hundred leaves in the pound, and I would set down 75 opposite the number of leaves in the hand set down, and would treat the hand as dutiable at 75 cents.

I treated each of the ten hands in the same way, setting down on the paper the result as above stated. Then, if I found that five of the ten hands had over 100 leaves to the pound and five had just 100 or under, I classified fifty per cent of the weight of the bale out of which those hands were drawn at 75 cents and fifty per cent of it at 35 cents per pound, and as I classified the bales so I classified the plantation lot to which the bale belonged.

Of this invoice I only examined the thirty packages sent to the public stores. The examination of each of them was similar to that I have described, except that where I clearly found at sight over 100 leaves to the pound I classified them at 75 cents. I was subpœnaed to bring the record of the weight and number of leaves of these bales, but was unable to find it.

Being cross-examined:

We used a table to aid us in determining the number of leaves from weight. These hands were drawn from different parts of the bales. Every hand that is drawn injures the bale more or less. This tobacco was all wrapper tobacco. The only thing I had to determine was as to the weight. The question of being suitable or fit for wrappers we could only determine by having a small factory to work it up.

Being re-examined the witness said:

There was a difference in weight between the different hands ex-
39 amined in almost every instance. We passed all Sumatra tobacco as suitable for wrappers, and made no examination as to whether 85 per cent was of the requisite size or fineness of texture. We assumed that, and passed all as suitable for wrappers.

Being recross-examined the witness said:

I never took out as many as twenty hands from a bale, nor weighed all the hands. I never untied the hands and separated the leaves. I counted the leaves without untying.

Plaintiff's counsel called as a witness FREDERICK A. SCHROEDER, who, being duly sworn, testified as follows:

I am one of plaintiffs and for fifteen years I was a large manufacturer of cigars and have been interested in the manufacture until a year ago. I reside in Brooklyn; have been mayor of that city. My place of business is at No. 178 Water street, New York City. Our business is importing leaf tobacco and dealing in domestic leaf tobacco. I have made

tobacco a study for many years and am familiar with the kinds of tobacco that come into this port. It is grown in all parts of the globe. There are two great divisions in leaf tobacco, one is that which is mainly and almost exclusively used for smoking and chewing, and which is grown in the Southern States, and Turkey, Egypt, and Greece; the other is almost exclusively, except lower grades, used to manufacture into cigars. That division as far as the domestic tobacco is concerned is divided into three great classes, the wrapper, binder, and filler classes. That grown
40 on the Island of Cuba is divided into the wrapper and filler class. That grown on the island of Sumatra is divided into a number of classes. The highest class in the trade is considered what is called "blad" or "leaf." In English it means the sound leaf. The next is what is called "stukblad," which means ragged leaf. In that class the leaf is assorted and a very small proportion of it is suitable for wrappers, while of the "blad," which is also often called in the market "Sumatra wrapper," a larger portion is suitable for wrapper purposes.

This "blad" or "leaf" is assorted according to plantation marks into three or four different sizes. Some plantations have two, some more; the sizes are not even. There is no such regularity in the leaf as there would be in the manufactured article. In fact, tobacco leaves are like the human face—no two are exactly alike. The last grade is what is called "cutting goods;" it is mainly used for fillers or for smoking tobacco. The tobacco, the subject of this claim, is what is termed leaf or blad, or wrappers. It is put up on the plantations in bales covered with a matting, when they appear in the Amsterdam market, which is the great market for the Sumatra tobacco. The 429 bales in this invoice were received at New York in the original packages in which they were put up on the plantation, except the outside linen covering was put on at Amsterdam, where we bought the tobacco. All of the tobacco in the particular bales which are the subject of our claim here was not of a size suitable for wrappers. The
41 following considerations affected the size of the leaves of those bales: That the leaf was either too small for a wrapper originally, or by being broken or torn so the parts of the leaf on one or both sides of the stem were not suitable for wrappers. The size of the leaf which is suitable for wrappers is affected by the attacks of insects in its growth, by rust caused from dewdrops and by the sun burning and destroying a part of the leaf, by storms whipping the leaf as it stands in the field and breaking off parts of it, by overheating while the tobacco is curing in the shed, thus destroying so much of the texture that parts of it drop off before the tobacco reaches the market. A good deal of the leaf is destroyed by handling in transportation. The samples produced were drawn by Linde, Hamilton & Co., samplers, by our direction, and are fair samples of the tobacco in question. The samples were kept in tight cases after they had been examined and are duplicate samples of each of the public-store bales. They are as fair a representation of the bales as we would make of them if we were drawing samples to offer to a buyer.

We can not make an exact representation of a bale of tobacco containing from six to seven hundred hands by drawing eight hands, and these tobaccos are not sold on samples as domestic tobaccos are sold, but always subject to examination. The sample gives the manufacturer an idea of the wrapper power of the leaf and he can form a judgment as to the qual-

ity, color, &c., of the bale; then when he receives it, if he is at a
42 distance, he opens the packages and examines it, and if he finds it not like the sample he ships it back to us. If it is in the city or handy so that he can make an examination we do not deliver the goods unless he examines the bale. We demand that.

We cut them open, letting him examine them to his heart's content. He can take as many samples as he pleases and moisten them and try them; that is the way sales are made here usually of Sumatra tobacco. In respect to domestic tobacco, the samplers guarantee the samples equal to the tobacco, but on account of the inequality, change, and high value of these foreign tobaccos, no samplers will guarantee, and therefore sales are not made by samples, but by actual examination of the tobacco. I have here samples from the four public-store bales from which the examiner drew samples for the Government on the classification of the particular lots in respect to which we claim a refund. The lot of 27 bales represented by samples No. 1679 did not have 60% of the weight nor over 70% of the leaf surface suitable for wrappers, regardless of the stem. In the lot of 10 bales represented by sample 1524 there was not 80% of the surface suitable for wrappers; regardless of the stem, not 65% of the weight. The lot of 10 bales represented by samples 1561 to 1570 inclusive, and the lot of 20 bales Nos. 1755, 1774 represented by No. 1760, in my judgment has 85% of the surface of the leaf suitable for wrappers and less than 78% of the weight suitable for wrappers. I mean that 85% of the surface measurement of the leaf was suitable, in
43 my judgment, if the stem is not taken into consideration.

In respect to requisite fineness, if the stem is not considered as a part of the leaf, then I think 85% of the two sides of the stem was suitable in fineness of texture for wrappers. Take a leaf and stem it and there are two sides of the leaf. There was some deficiency, but 85% of the surface of the samples of these two bales was, in my judgment, of sufficient size and fineness of texture to be suitable for wrappers. The stems are not of sufficient fineness of texture to be suitable for wrappers and are never used for wrappers. I made an estimate of the weight of the stems. The weight of the stems was over 20% of the weight of the leaves in each of the lots.

In the manufacture of a cigar fillers are those leaves which are inside of the wrapper, then sometimes there is a binder over the filler and the wrapper is placed over all. As a rule the Sumatra leaf of tobacco was on the outside, and that which is not for any reason of the requisite size and fineness of texture to be suitable for wrappers is used for fillers or for smoking tobacco or for fertilizing purposes. That part of the leaf which is used for wrappers is stripped from the stem and examined, and what is suitable for wrappers is used. Only one piece is used for one cigar. One side of the leaf wraps from one to four cigars.

On the withdrawal of May 6 we received in one lot bales 1526/29, on which we paid 75 cents a pound duty. We also received 1564, on
44 which we paid 63 cents. On the withdrawal of May 7 we received four bales, 1771 to 1774, and one bale of another lot, 1889, on all of which we paid 75 cents a pound duty. The 63 cents is the average of 30% at 35 cents, and 70% at 75 cents. In my calculation of 85% of the surface I do not exclude the stem, but include them. In my exami-

nation I found leaves destroyed by insects; they can be easily distinguished; that is, one that has been eaten. Some lots are a great deal more eaten by insects than others, and some are, in the language of the trade, almost perfect. Whether the eaten leaves are thrown out or not depends upon the persons who put them upon the plantation. These samples produced are from the identical bales which went to the public stores, and fairly represent the importation. They are a per cent of the particular lots to which they belong. This whole importation is subdivided into different plantation marks, and they fairly represent those particular marks, and fairly represent the bales which I have mentioned in this suit. When bales are specified on the invoice as coming from certain plantations, those all correspond and are of the same degree of fineness and quality, and one bale coming from a plantation is as near a representation of all the bales coming from that plantation as you can represent a large lot of tobacco by such a sample.

Those bales were designated for examination by an officer of the custom-house. There are no two leaves exactly alike nor any two bales exactly alike.

45 The sides, as they may be called, of the tobacco leaf are those parts which lie on both sides of the stem; more than one wrapper is sometimes made out of one of those sides. In my examination of the samples of this importation to determine what percentage of the surface was suitable, I said that if both sides of the stem were complete I counted the leaves as perfect, and if one side was torn or had holes in it, or in any other way was imperfect, and the other side was perfect, we gave credit for the whole leaf; or, if one side was sufficient to make a wrapper for a cigar, we gave credit for the whole leaf. From my experience in dealing in and handling leaf tobacco, I am able to say that the hands containing more than 100 leaves to the pound would invariably weigh less than the hands containing less than that number. The hand containing the heavier leaf weighs the most. The hands containing the lighter leaf would weigh the least. As a rule there are about the same number of leaves to the hand whether the leaves are light or heavy. I was present at the public stores when the examination of my tobacco was going on. There were a number of bales that had been ordered there from the public stores, and they were placed in a line along the wall. The porters would cut the cloth, and then the matting part, way down the sides; and then sometimes the porters would draw a certain number of hands, ten or twelve, and sometimes Mr. Hammill would draw ten or twelve hands. They would hand them to Mr. Hammill or Mr. Hammill would bring them from that place, which was back of the office, where the hands were weighed—he would bring them

46 into the office; they had scales there (Mr. Sturges was present at the time) and he weighed each of the hands, and he and the porters and Mr. Sturges all counted some of the leaves, and each one put down how many leaves were in each hand that he counted, and the weight of each of the hands, and the number of leaves in the hand. Then Mr. Sturges turned to me and said: "Now, that is the way we examine your tobacco. Don't you think that is right?" I said: "I have nothing to say about your examination. I think it is all wrong. You have not examined or opened a single leaf of this tobacco, and there is any quantity of it that is not suitable for wrappers, either in size or texture." He said: "We can-

not go into that. It is all wrappers. It is one hundred per cent wrappers, in our judgment. We don't examine any leaves here. Your manufacturers do that." Of course I disagreed with them. That was all that took place.

We sold the two bales 1524 and 1679 to Bowles, Clyner & Co., of Philadelphia. They took all the 27 bales of lots 1679 and 6 bales represented by lot 1524. They had all of 1529.

Being cross-examined, witness said:

I complained to the appraiser at the time I have referred to about their leaving the bales open, about opening a large number of bales at one time. I said the tobacco dries out and is injured in value and there is no necessity for allowing it to lie there open. They returned these bales with the matting all cut; did not sew up the matting, only the cloth. The
47 appraiser gave orders that the matting should be sewed up and the bales tied up.

I complained that they kept the bales open too long; that there was no necessity of opening so many bales and allowing them to stand along the wall drying out, spread apart, the hands along on the table while they were examining them. I said they ought to take better care of this merchandise, because it was hurt in value by allowing it to lie exposed to the air in that way and drying out.

By the COURT:

I said with regard to 1561, or one of these bales, that it was a very fine parcel, and that regardless of the stem 85% of the surface of the leaf was suitable for wrappers, but not to exceed 78% of the weight of the leaf. I counted the stem as among the rejected parts. I think I said not to exceed 78%; it was really less.

Plaintiffs' counsel then called as a witness, FREDERICK A. WAGENFUEHR, who, having been duly sworn, testified as follows:

Have been in the employment of plaintiffs since 1875, and am a practical cigar-maker. I moistened the samples which have been brought into court and closely examined 1679. That sample contained 122 leaves. I examined to see in how many of the leaves both sides were fit for wrappers and found 44 leaves of which both sides of the stem were fit for wrappers; I found 38 leaves of which only one side of the stem
48 was fit for wrappers; I found 40 leaves that were, in respect to size and texture, unfit for wrappers. They were either too small or they were torn, and some were worm eaten; a few were too thick or too coarse to make a wrapper.

Plaintiffs' counsel then called as a witness WILLIAM ROBERTS, who, having been duly sworn, testified as follows:

Am foreman for Steinecke & Karr, cigar-makers, who employ on an average 120 hands; have been a practical cigar-maker for 15 years. I examined yesterday sample No. 1679.

Q. What did you find? (Objected to on the ground that these goods having been examined in May, 1889, testimony as to their condition in Jan., 1890, is incompetent, immaterial, and irrelevant. Objection overruled; exception by defendant.) I found 122 leaves, 48 of which both sides were of the size and texture fit for wrappers; of 38 leaves one side of stem was fit for wrappers, and the other half unfit; 36 leaves were

totally unfit for wrapper purposes. I examined sample 1524. In it I found 151 leaves; in 96 leaves both sides were of the requisite size and texture fit for wrappers; 32 parts on one side of the stem were fit for wrappers and the other half unfit, and 23 leaves were totally unfit for wrapping purposes.

Plaintiffs' counsel then called as a witness PETER MACKIN, who, having been duly sworn, testified as follows:

49 I am foreman for Walter E. Barnett, a large cigar manufacturer, corner of Water street and Maiden Lane, this city. I examined sample 1679 and 1524 yesterday with Mr. Roberts and found them exactly the same as he did. We agreed exactly. The weight of the stems in these tobacco leaves is at least 20 % of the whole weight. The stems are sold or given away.

Being cross-examined: I am in the employ of Walter E. Barnett, 135 Maiden Lane; he is there to-day.

Plaintiff's counsel then called as a witness SIMON HENRY, who, having been duly sworn, testified as follows:

I am a cigar manufacturer, familiar with Sumatra tobacco. My place of business is 414 East 13th street. I have examined sample 1679 and 1524. In 1679 I found 122 leaves, of which 45 were both sides suitable in respect to size and fineness of texture for wrappers. I found 37 of which one side was suitable in the same respects; the other side not. I found 40 leaves totally unfit for wrappers. Some were too small, some were broken, some had large holes in them, worm-eaten, some were what we call flea-bitten, a few were, of course, thick texture. I went over 1524, but did count the leaves. I looked at that in the same view as though I was purchasing it, and judged, after looking over every leaf, that there was not more than about 75 % actually fit for wrapping purposes in respect to size and fineness.

Plaintiff's counsel read in evidence the following decisions of the Treasury Department:

50 EXAMINATION AND CLASSIFICATION OF LEAF TOBACCO.

TREASURY DEPARTMENT, *August* 1, 1887.

SIR: The Department duly received your letter of May 12 last, transmitting the appeal (2533 p.) of Mr. B. Weyl from your decision assessing duty at the rate of 75 cents per pound on certain leaf tobacco imported into your port from Paso Del Norte, Mexico, March 1, 1887.

The samples accompanying your letter were forwarded to the collector at Baltimore with the appeal papers, with a request for his opinion with particular reference to the question whether the requisite percentage of the tobacco represented by the sample is suitable for wrappers under T. I., new, 246.

The collector at Baltimore returned the papers and samples, enclosing a report from the appraiser of port, from which it appears that from an examination of the samples fifty-nine out of every one hundred leaves are of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and that it requires more than one hundred of such leaves to

weigh a pound, and both the collector and the appraiser at Baltimore were of the opinion that the invoice in question was properly dutiable at 35 cents per pound.

The proper determination of the point involved will depend upon the construction which should be given the paragraph 246, especially with reference to the unit which should be adopted in ascertaining
51 whether 85 per cent of the commodity is of the weight and quality which will render it liable to a duty of 75 cents per pound.

The language of the paragraph would not seem to leave much room for doubt in this respect. The subject of the tax is "leaf tobacco," not "bales," or "hands," or "packages" of leaf tobacco, and the liability to duty can not be made to depend upon the form of the package which the importation is made.

Every leaf, 85 per cent of which is suitable for wrappers, and the weight of which is such that more than one hundred such leaves would be required to weigh a pound, is declared to be liable to the high rate of duty. This view is further strengthened by the provision in the paragraph that in determining the weight the individual leaves alone are to be regarded. The weight is not to be determined by hands or packages or bales, but by leaves.

It is contended that in determining the percentage suitable for wrapper, the Government can not include any more than that part of each leaf which is actually and finally used in the manufacture of a cigar, and hence, it is further contended, that if, in working up the leaf 85 per cent of it does not thus enter into the manufacture of the cigar as a finished product, then the tobacco is dutiable at the low rate. And as in no case 85 per cent of any leaf is ever thus used, it would follow that the high rate of duty could never be imposed.

I do not think that such a construction can be sustained. The
52 law has reference to leaf tobacco in the condition when imported, and not to the final results which may be obtained from its manufacture into cigars. It is dealing with a kind well known to the trade as suitable for wrappers, that is, fit to be set apart for use for such purpose; and if 85 per cent of the leaf properly comes within that designation, and is of the requisite weight, the conditions of the law are met, and the high rate of duty should be imposed.

It has been suggested that it would be difficult, if not impracticable, for the appraiser to adopt the leaf as a unit, but it is not believes that such an objection rests upon tenable grounds.

Under the instructions already issued by the Treasury Department and now in force (see Synopsis 7350 and 8299), it is the duty of the appraiser to ascertain and determine whether any given importation contains two different kinds or qualities of wrapper tobacco, subject to different rates of duty, or whether wrapper-leaf tobacco, liable to the higher rate of duty, is mixed with other leaf tobacco, and to ascertain and determine the proportion of each and assess duty accordingly. And the method adopted, as I understand it, is to take one or more bales, according as in the judgment of the appraiser it may be necessary, which would be regarded as representing the entire importation, and out of such bale or bales to draw at least ten hands or packages, which would be regarded as representing

the bale, and then to examine each of these hands or packages and ascertain how many leaves in each are of the requisite quality for wrap-
53 pers and of such weight that more than one hundred would be required for a pound, and the proportion of such leaves so ascertained may properly be regarded as representing the quantity of such leaf tobacco in the entire importation. For instance, if the ten hands thus examined contained, in all, four hundred leaves, and two hundred of those leaves were of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of such weight that more than one hundred were required to weigh a pound, then one-half of the entire invoice might be held to be dutiable at 75 cents per pound, and the remainder at 35 cents per pound.

If it is the practice to regard the hand or package as the unit, and in case 85 per cent of it is not found to be of light weight and suitable for wrappers, then to regard the whole importation as dutiable at 35 cents per pound? I think such practice is not in accordance with the intent of the law, and should be discontinued.

The views here expressed are in accord with the opinion of the Attorney-General of April 23, 1884, in which he observes that the act is silent as to packages or bales, or any other merely commercial form in which the merchandise is imported, and declares that "wholly irrespective of such commercial form, the duty is levied directly upon the article by its qualities for certain sort of consumption; that is, into wrappers." And again says: "Upon the facts of the provision, therefore, I submit
54 that duty will attach to tobacco of the statutory description therein given, no matter what be the vehicle in which the tobacco is imported." And in conclusion he says: "I advise that there is no reason in the words of the statute why bales, packages, &c., may not be broken up in order to sort such different grades of leaf tobacco as may be contained therein."

It follows that in the case under consideration 59 per cent of the invoice was dutiable at 75 cents per pound, and 41 per cent at 35 cents per pound, assuming that the sample presented fairly represented the different kinds or qualities of wrapper-tobacco contained in the importation.

You are therefore authorizing to reliquidate the entry accordingly and to take the necessary steps for refunding any excess of duties.

While this appeal has been pending before the Department, application has been made on behalf of the importers of Sumatra leaf tobacco for a modification of the instructions heretofore given to the collector of the port of New York upon the subject, or that further and more explicit instructions be issued, and a hearing has been had of all parties interested in the question, and the arguments presented upon both sides fully considered, and it is believed that the decision above rendered covers all the points involved in such application, and the Department declines to issue any other or further instructions upon the subject than that what are
55 contained in this decision and the decision heretofore rendered upon the subject, which are modified so far as they may be in conflict herewith.

Respectfully, yours,

I. H. MAYNARD,
Assistant Secretary.

COLLECTOR OF CUSTOMS, *El Paso, Tex.*

EXAMINATION AND CLASSIFICATION OF LEAF TOBACCO.

TREASURY DEPARTMENT, *June* 20, 1887.

SIR: The Department is in receipt of your letter of the 15th instant, reporting on the communication of Messrs. Havemeyer & Vigelius concerning the practice now prevailing at your port with regard to the examination and classification of leaf tobacco of the wrapper class. It appears from the report of the appraiser, transmitted with your letter, that the existing practice is based upon Department decision of February 3, 1886 (synopses 7350), which requires that leaf tobacco shall be thoroughly examined by the appraiser in order to determine the proper classification thereof under the tariff acts.

The appraiser reports that owing to a change in the character of certain leaf tobacco now imported, whereby some of the contents of each bale is liable to a duty of 75 cents per pound, while the remainder is
56 dutiable at 35 cents per pound, the classification cannot be determined by an "inspection" of the bale, and that it would be almost destructive to the merchandise to determine the proportions of fine and heavy leaf contained therein by an actual assorting of the "hands contained in the bale." He suggests that a proper classification of such tobacco can be reached by drawing indiscriminately not less than ten hands or more, if in the judgment of the examiner the same be necessary, from each representative bale; separately counting and weighing these "hands" and taking the proportion of light and heavy "hands" so found for the purpose of determining the proportion for the whole bale or lot.

You state that in your judgment the law does not contemplate such an examination by the appraiser as will destroy or even damage imported merchandise, if avoidable, and that you commend the proposition of the appraiser to the favorable consideration of the Department.

The Department concurs with you in such views, and you are therefore authorized to adopt the proposition of the appraiser and to instruct that officer to carry it into practice in ascertaining the proper classification of imported leaf tobacco.

Respectfully, yours,

I. H. MAYNARD,
Assistant Secretary.

COLLECTOR OF CUSTOMS,
Chicago, Ill.

57 LEAF TOBACCO—HOW CLASSIFIED.

TREASURY DEPARTMENT, *February* 3, 1886.

SIR: Referring to Department's ruling of May 1, 1884 (synopses 6324), concerning the classification of leaf tobacco, it is understood that the present practice at your port is not in strict conformity with the rule therein laid down, which was advised by the United States Attorney-General, the classification of such tobacco being, in fact, made upon examination of average samples drawn from the bales containing the tobacco, by reason of which it is subjected to a duty of 35 cents per pound only, when in fact, a large portion thereof in each bale consists of a "wrapper class of which"

85 per cent is of the requisite size, and of the necessary fineness of texture, to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, which is dutiable at 75 cents per pound.

The rule laid down by such decision for ascertaining the proper classification of such leaf tobacco, which has lately been affirmed by the United States circuit court of New York, in the suit of Falk against Robertson, is that the different bales and packages which, as admitted by all parties, contain two different kinds or qualities of the wrapper class, should be broken up, and each different quantity of each class separate for the purpose of classification, so that the portion consisting of the class
58 above mentioned should be subjected to a duty of 75 cents per pound, as described by Schedule E (T. I. new, 246) and the other portion which does not come up to that standard should be subjected to a duty of 35 cents per pound, under T. I. new, 247.

You are, therefore, directed to conform the practice at your port in the classification of such leaf tobacco to such ruling, and for that purpose you will require at least one bale in ten of every invoice to be thoroughly examined by the appraiser, and, if tobacco subject to the two different rates of duty be found therein, that the quantity of each be ascertained by an inspection, if possible, or if not by inspection, then by an actual assorting of the "hands" and that the proportion of each sort so ascertained shall determine the proportionate parts of the whole invoice for the purpose of classification at the different rates of duty. In case importers object to the opening and actual examination of such representative bales the whole quantity should be assumed to contain wrapper leaf-tobacco, of the class paying the highest rate of duty.

Respectfully, yours,

C. S. FAIRCHILD,
Assistant Secretary.

COLLECTOR OF CUSTOMS,
New York.

FREDERICK A. SCHROEDER, being recalled, testified as follows:

In my estimate of the 85% suitable for wrappers in respect to
59 size and fineness, I arrived at my estimate by considering the two sides of the leaf separately from the stem. If one side of the leaf was suitable for wrappers, I gave the estimate the benefit of that one side; when one side of the leaf was found not suitable because of any injury or lack of size or want of texture. If I had thrown out the whole leaf the percentage would have been reduced.

Plaintiffs' counsel then called as a witness FREDERICK W. BROOKS, who, having been duly sworn, testified as follows:

I am liquidator for the custom-house. The amount exacted by the collector in excess of 35 cents a pound, with interest, on the bales here claimed on is $708.12. The liquidator computed the duty upon the tobacco as follows: The appraisers' return specified by numbers the grade of the tobacco. It indicates that part of the tobacco by numbers of the bales which is dutiable at 75 cents and that which is dutiable at 35 cents. The weigher gives the weight of each bale, and his return is attached to the entry. For instance, the liquidator liquidated bale 1564 or that lot, in suit, as follows:

From an inspection of the appraisers' return upon the entry it appeared that bale 1564 was one of those upon which the appraiser declared that 70% was dutiable under paragraph 246 of Heyl and 30% under paragraph 247. The weighers' return gives the gross weight of the bale and the actual tare, and the liquidator assesses duty by taking the number
60 of net pounds and assessing duty upon it at the rate of 75 cents per pound, upon 70% of that weight 35 cents per pound, upon 30% of that weight. He applied the percentage to the weight of the bale. There is nothing in the weigher's return that show the weight of the respective classes of tobacco in that bale; there is no return which shows the weight of the different hands found by the appraiser to be of different classes.

GEORGE G. HAMMILL, being recalled, testified as follows:

Only 30 bales were ordered to the appraiser's stores. The collector originally directed 5 bales to be sent to the public stores; afterwards the appraiser ordered 25 bales more; these were all that were examined in any way. In my classification I did not deem it necessary to weigh each and every bale. The examinations that were made by me of the leaf tobacco in Mr. Sturges' presence, whenever he was present, were precisely the same as I have already detailed.

Being cross-examined:

The 30 bales were all opened, and where I came across short leaves—for instance, seconds—that in my judgment were not in strictly 75-cent goods, I did not waste time nor go to the trouble of weighing them. When I came across strictly 35-cents goods of heavy, coarse leaves I did not weigh them; where there was any doubt in my mind I weighed them. When I found tobacco about which, in my judgment, there was no ques-
61 tion I did not weigh the leaves, but where there was a question, and a further examination was needed, I opened the goods and examined the hands and the kind of tobacco. I did not do that in every instance in these 30 bales; I inspected the tobacco to satisfy my judgment by opening the bales and examining the hands, and took out 10 hands of every bale that I deemed it necessary to weigh. If it was strictly 75-cent goods it was no use to weigh it. I opened every bale of the 30 and looked into it; as to some of the 30 I did not draw any hands; I did not deem it necessary to do so.

Plaintiffs' counsel then called as a witness ABRAHAM S. GOFF, who' being duly sworn, testified as follows:

I am superintendent for Bowles, Clymer & Co., cigar factory, Philadelphia. I remember receiving the bales of tobacco about which Mr. Schroeder testified, and had charge of the working of those goods up. I could not say the exact percentage of that tobacco which was of the requisite size of the leaf and fineness of the texture to be suitable for wrappers, because I did not weigh them. The percentage was unusually large of the torn tobacco that we threw out of each bale. I made an estimate of the percentage, but cannot state definitely whether 85% was suitable for wrappers.

Plaintiffs' counsel then rested.

Defendant's counsel then called as a witness EDGAR M. CRAWFORD, who, being duly sworn, testified as follows:

62 I am a dealer in leaf tobacco of all kinds, Havana, Sumatra, seed leaf, and other imported tobacco. I have been dealing in Sumatra tobacco, more or less, since its first importation in this country; that is, for eight or nine years. I buy from the importers, and have occasionally bought from Mr. Schroeder. In a fairly good bale of Sumatra tobacco as imported into this country prior to March 3, 1883, making allowance for such leaves as might be torn, or so destroyed that they could not be used for wrappers, the proportion in a bale of tobacco that would be suitable in fineness of texture and in size to be used as wrappers would be difficult to state. The general practice in the trade in the purchase of Sumatra tobacco is to purchase by samples which the importer has drawn, and if the tobacco from this sample is found to be suitable, we then go to the warehouse and open as many bales as we may desire to satisfy ourselves as to the manner in which the tobacco has been packed. We satisfy ourselves of this latter fact by drawing a certain number of hands from different parts of the bale that we opened. We never draw less than four hands, and it may run four hands, six hands, eight hands, or ten hands, according as we may find whether the bale has been packed honestly, as we term it, or whether it has been packed mixed. If the first four hands drawn should be entirely uniform, we probably would not draw any more, and in any event we would be hardly likely to draw more than ten hands.

63 The examination of ten hands of tobacco for the purpose of judging of the contents of the bale would be, in the trade, considered a fair examination. In plaintiffs' Exhibit S–1561–2, excepting certain leaves which are broken, and probably had been broken since they were taken from the bale, I should say that all these leaves were suitable for wrappers; there may be defects which casing would exhibit, and which cannot be determined otherwise; by "casing" I mean the preparation for use. Judging from the same in its present condition, I should say that all of it was suitable for wrappers.

Cross-examined by plaintiffs' counsel:

I am not a segar manufacturer; I have rolled a great many segars for my own smoking, but I have never manufactured segars. This hand (plaintiffs' Exhibit 1561–2) is in the condition in which hands usually come from the bale; it is somewhat dryer. We do not usually buy and sell Sumatra tobacco upon such an examination of a hand as I have made of this one; we usually take a hand or two at our office for casing; that is, putting it in a proper condition for working, by moistening, to see if they reveal any defects. We do not moisten tobacco if it comes out of the bale soft enough to thoroughly handle, but we do thoroughly handle them and spread them out; we spread out a certain number of leaves and look at them. We do not open every leaf of every hand, but enough to satisfy us of the general character of the hand. The object of taking the hand to our office and spreading out every leaf, is not to determine whether the hand is a hand of tobacco of sufficient size and fineness of texture

64 to be suitable for use as wrappers; it is designed to disclose the fact of what kind or quality of wrappers the leaves are fit for. With very few exceptions, all Sumatra tobacco is suitable for wrappers; all these

leaves are large enough for wrappers. As Sumatra tobacco would not pay the amount even of the lowest rate of duty, or would not bring even the lowest rate of duty, it is never imported except for wrappers. I should not suppose that every leaf of every hand is large enough and suitable for a wrapper. There is a class of tobacco which, I believe, the Germans call "stukblad," which is an assorted quality of Sumatra, all of which, every leaf of which, or almost every leaf, has either a hole, or a break, or something of that kind. It is known as a distinct quality as packed by itself; it is assorted and packed by itself; and that tobacco is sometimes brought to this country; but it is brought here for wrappers all the same, because it would not do to import it for anything else. Some of the spotted leaves of Sumatra tobacco are the finest that come to the market. There is certainly Sumatra tobacco which contains worm-eaten holes and holes made by other causes, but these defects are not found in the ordinary Sumatra tobacco of commerce; there might be a leaf here and there so affected, but it would be only an occasional leaf.

The defendant, further to maintain the issues on his part, then called as a witness Amasa H. Scoville, who being duly sworn, testified as follows:

I am a dealer in leaf tobacco and have been about thirty years.
65 I deal in all kinds of what is commonly called leaf tobacco. I am an importer of Havana tobacco; I do not import Sumatra, but I deal in it to a moderate extent; I buy the Sumatra tobacco from the importers; I have dealt in it moderately since it commenced to be a factor in the trade. In the purchase of Sumatra tobacco, samples are usually presented to the buyer by the importer; if he likes them after an examination in various ways, and casing some of the hands brought to him, if a price is agreed upon, the buyer goes to the bonded warehouse for examination to see whether the bales which he has bargained for correspond with the samples shown him. I always select a few bales from the lot of scattering numbers, some the first numbers, some the middle, and some the last numbers, open them, and draw as many hands as I see fit. It if compares favorably with the samples I draw less hands than I would if it did not, but I draw sufficient to satisfy me that the tobacco is according to the sample. I do not think that I should draw less than three or four hands, and I might draw more than ten, but not usually. If a bale of tobacco is properly opened and the hands drawn out and then the bale is closed the bale would not be much injured; the hands themselves which were drawn out might be by opening when they are dry, but the bale itself would not be materially injured; so that if ten hands were drawn from a bale the hands themselves undoubtedly would be injured to some extent; it would depend upon the handling of them, how carefully it was done, or if they undertook to force them back; if fifty hands were drawn, I think,
66 the fifty hands would be more or less injured; if the whole bale was taken apart and every hand examined, it would be a decided injury to the tobacco, unless done with great care, in a proper room, with proper moisture, and all that kind of thing. I do not think that it is impossible to examine a bale leaf by leaf, but it would have to be done with extraordinary care and great expense, or else there would be a great injury. Plaintiffs' Exhibit 1561–2 is Sumatra leaf tobacco. On the outer edge of the sample there is considerable broken leaf; whether that has become broken by handling since or at the time it was drawn it is impossible to

say. If that is the way it was first drawn out of the bale originally, then there is quite a percentage of broken leaf in it. I should not think there was fifteen per cent of broken leaf. If the leaves in this hand were not broken or destroyed in any way I should think that eighty-five per cent of it ought to have been suitable for wrappers; it was undoubtedly intended for all to be wrappers.

Cross-examined by plaintiffs' counsel:

Upon examination of a proposed purchase of Sumatra tobacco, I have sometimes rejected bales. Sumatra tobacco does contain broken leaves and worm holes, and large green spots that render it unfit to be used for wrappers.

Defendant then rested and the testimony was closed.

Defendant's counsel moved for a direction of a verdict in favor of the defendant, upon the ground that the plaintiffs had not established facts sufficient to constitute a cause of action.

67 The court denied this motion, to which ruling defendant, by his counsel then and there duly excepted, and the exception was duly noted and allowed.

Defendant's counsel then asked to be allowed to go to the jury generally upon the issues of the case.

The court denied this request, to which ruling defendant by his counsel then and there duly excepted, and the exception was duly noted and allowed.

Defendant's counsel then asked to go to the jury upon the question: Whether there had been one package in ten examined in this case, claiming that, although there was not one bale in ten of the entire invoice sent to the public stores (there having been in fact only thirty bales out of 429 sent there) yet, as there were only ten bales in controversy in this suit, representing four plantation lots, and as four sample bales representing those ten bales had been actually examined at the public stores, there was a sufficient compliance with the statute.

The court refused to submit this question to the jury, to which ruling and refusal defendant, by his counsel, then and there duly excepted, and the exception was duly noted and allowed. Plaintiffs' counsel then moved for the direction of a verdict in his favor.

The court granted the motion, and directed a verdict in favor of the plaintiff for the sum of $708.12, to which ruling and direction the defendant, by his counsel, then and there duly excepted, and the exception was duly noted and allowed.

68

And for as much as the foregoing matters of fact and law do not otherwise appear upon the records of the trial, the judge before whom this cause was tried has settled and signed the foregoing as and for the bill of exceptions here nunc pro tunc as of the ninth day of January, 1890.

E. HENRY LACOMBE.

Correct:

W. B. HILL, *Atty.*
By S. C. & S.,
Of Counsel.

(Endorsed:) 14092. U. S. circuit court, southern district of New York. Frederick A. Schroeder et al. versus Joel B. Erhardt. Defend-

ant's bill of exceptions. Edward Mitchell, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. U. S. circuit court. Filed June 19, 1890. John A. Shields, clerk.

69 Supreme Court of the United States.

Assignment of errors.

JOEL B. ERHARDT, PLAINTIFF IN ERROR,
vs.
FREDERICK A. SCHROEDER, ISIDORE M. BON, Edwin A. Schroeder, and William J. Hazlewood, as and composing the firm of Schroeder & Bon, defendants in error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error, by Edward Mitchell, said (his) att'y, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MITCHELL,
U. S. Attorney, Attorney for Plaintiff in Error.

70 (Indorsed:) United States Supreme Court. Joel B. Erhardt, plaintiff in error, vs. Frederick A. Schroeder & al., defendants in error. Assignment of error. Edward Mitchell, U. S. attorney, attorney for pl'ff in error. Due service of a copy of the within assignment of error is hereby admitted this 24 day of June, 1890. W. B. Hill, attorney for defendants in error. To Wm. B. Hill, esq., attorney for in error. U. S. circuit court. Filed June 24, 1890. John A. Shields, clerk.

71 UNITED STATES OF AMERICA, *ss:*

To FREDERICK A. SCHROEDER, ISIDORE M. BON, EDWIN A. SCHROEDER, AND WILLIAM J. HAZLEWOOD, AS AND COMPOSING THE FIRM OF SCHROEDER & BON, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joel B. Erhardt, plaintiff in error, and you are defendants in error, to show cause, if any there be,

why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Dated, New York, June 23, 1890.

E. HENRY LACOMBE.

72 (Indorsed:) 14092. U. S. Supreme Court. Joel B. Erhardt, plaintiff in error, against Frederick A. Schroeder & als., defendants in error. Citation. Edward Mitchell, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 24 day of June, 1890. Wm. B. Hill, attorney for defendants in error. U. S. circuit court. Filed June 24, 1890. John A. Shields, clerk.

(Indorsed on cover:) No. 5211. Joel B. Erhardt, collector of the port of New York, plaintiff in error, vs. Frederick A. Schroeder, Isidore M. Bon, Edwin A. Schroeder, and William J. Hazlewood, composing the firm of Schroeder & Bon. S. New York, C. C. U. S. Filed October 3, 1890.

CASE NO. 14202.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOEL B. ERHARDT, COLLECTOR OF the port of New York, plaintiff in error,
vs.
FREDERICK A. SCHROEDER ET AL. } No. 211.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid under protest. The importations were made in 1888, so that the case is governed by the tariff law of 1883. The action was tried before Judge Lacombe and a jury. A verdict was directed in favor of the importers and the collector assigns error.

The importations were of Sumatra leaf tobacco, not stemmed.

The collector levied duties under paragraph 246 of the tariff law of 1883, which is as follows:

> Leaf tobacco, of which 85 per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, if not stemmed, 75 cents per pound; if stemmed, one dollar per pound.

Paragraph 247 is as follows:

> All other tobacco in leaf, unmanufactured and not stemmed, 35 cents per pound.

Part of the tobacco here in question was assessed by the collector under paragraph 246, part under paragraph 247. The importers claimed that it should have been all assessed under the latter paragraph.

The action was originally brought to recover $32,040.60 paid on 429 bales, constituting the entire importation. Recovery of the duties on 419 bales was abandoned by plaintiff at the trial, it appearing that these duties had been paid to Mr. Magone, defendant's predecessor in the collectorship. Nine of the remaining bales were rated at 75 cents, and the tenth bale at 75 cents on 125 pounds and 35 cents on 54 pounds.

It does not appear from the record upon what ground the verdict was directed, and the opinion is not reported in the Federal Reporter. We have, however, been supplied with a copy from the stenographer's minutes of the trial. It was as follows:

> Lacombe, J.: This case seems to me to be controlled by the decision in this circuit of Judge Shipman in *Ystalifera Iron Company* vs. *Redfield* (23

Fed. Rep., 650), following the decision of the Supreme Court in *Burgess* vs. *Converse*. I do not by that mean to hold, nor do I understand Judge Shipman to have held, that where the only inspection or examination is intended to determine whether an article is or is not a dutiable article, whether it be tobacco, or beans, or iron, or worsted, that in each case one package in ten must be sent to the public stores and examined. But Judge Shipman distinctly holds that where the examination and inspection is intended to determine what kind or kinds of dutiable goods of that class are the subject of importation, so as to see whether they are $1 or $1.25 per yard goods, or 3 or 4 cents per pound goods, or whatever it may be, the examination of one case in ten is an essential prerequisite. Between an inspection directed to that end and an inspection directed to the end of determining whether the various qualifications required to place this particular importation in some special variety of that class do or do not exist I fail to appreciate any distinction. Therefore I shall direct a verdict for the plaintiff for the full amount.

The Ystalifera case referred to in this opinion went off in this court upon technical points. (*Redfield* v. *Ystalifera Iron Co.*, 110 U. S., 174.)

Other claims, however, seem to have been made by the plaintiffs besides that on which the verdict was directed. They claimed that no part of the tobacco in any bale should have been rated at 75 cents unless the high-class tobacco constituted 85 per cent of the bale, and they claimed that none of the bales in question filled that bill.

STATEMENT OF FACTS.

1. *As to the number of bales examined.* Four hundred and twenty-nine bales of Sumatra leaf tobacco were imported November 5, 1888 (p. 9). Of these, 30 bales were examined November 19, 1888 (p. 10). Plaintiffs filed a general protest as to 398 of the bales January 29, 1889, four days after the liquidation (pp. 12–14). The 31 bales omitted from the protest are not involved in this suit. The protest was very long and in part self-contradictory. The plaintiff claimed, among other things, that 85 per cent of the importation was not of the requisite size and fineness to be suitable for wrappers; that in classifying for this purpose the leaf should be taken as the unit of quantity; that the hand should be taken as the unit of quantity; that the bale should be taken as the unit of quantity; that the invoice quantity should be taken as the unit of quantity; that there had been no legal appraisement of the tobacco; that the provisions of section 2939 of the Revised Statutes had not been complied with; that the weight had not been legally ascertained under the provisions of section 2890 of the Revised Statutes; that "the standard grade of said tobacco, ascertained in accordance with commercial usage, is less than the limitation specified in" paragraph 246.

One of the 10 bales in question (No. 1564) was actually examined at the public stores. The other 9 bales belonged to three different "plantation lots," of each of which plantation lots 1 bale at least had been so examined (p. 15). These plantation lots, so called, represented each the produce of a single plantation in Sumatra,

and "one bale coming from a plantation is as near a representation of all the bales coming from that plantation as you can represent a large lot of tobacco by such a sample" (p. 19).

2. *Method of examination.* The tobacco leaves were imported in packages called "hands." It does not appear what is the average number of leaves in a hand. Plaintiffs claimed that as a rule each hand contained about the same number, but of the only two samples counted here one contained 122 leaves, the other 151 (pp. 20–21). The examiner at the public stores drew 10 hands "promiscuously" from each bale. He then weighed each hand separately and counted the leaves in each. He assumed the leaves in each hand to be of uniform weight, and thus arrived at the number of leaves to the pound in each hand, and classified the tobacco accordingly. For instance, if he found that five of the ten hands had over 100 leaves to the pound, and five had just 100 or under, he "classified 50% of the weight of the bale out of which those hands were drawn at 75 cents, and 50% of it at 35 cents, per pound," and in the same proportion "classified the plantation lot to which the bale belonged." The weighing was done with the stems on, the hand never being untied (pp. 15–16). Yet the stem is admitted to represent 20% of the weight of the leaf (p. 18).

Almost all the hands differed from each other in weight (p. 16), but it was assumed by the customs officers that the hands of each class averaged the same in this respect. "We passed all Sumatra tobacco as suitable for wrappers,

and made no examination as to whether 85% was of the requisite size or fineness of texture. We assumed that, and passed all as suitable for wrappers." They made no attempt to classify except by weight, and did not untie the hands (pp. 15–16, 26). The liquidator for the custom-house took the examiner's return and the weigher's return of the gross weight of each bale and actual tare, and assessed the duty by applying the percentage to the net weight of the bale; that is, if the examiner reported that the bale was 70% dutiable under one paragraph and 30% dutiable under the other, the liquidator, taking the total number of net pounds in the bale, assessed it "at the rate of 75 cents per pound upon 70% of that weight and 35 cents per pound upon 30% of that weight" (pp. 25–26). "Every hand that is drawn injures the bale more or less" (p. 16). For this reason, apparently, the importer protested against the examiner's opening as many bales as he did open (p. 20); and while the examiner looked into all of the thirty bales sent him, as to some he did not draw any hands (p. 26).

The practice of the trade in testing the value of Sumatra tobacco is the same as that here adopted. The amount of hands drawn from each bale by the purchaser is from four to ten. One or two of the hands, indeed, are afterwards generally examined for quality by spreading out and moistening the leaves; this, however, "is not to determine whether the hand is a hand of tobacco of sufficient size and fineness of texture to be suitable for use as wrappers; it is designed to disclose the fact of what kind or quality of wrappers the leaves are fit for. With very few exceptions all Sumatra

tobacco is suitable for wrappers." (p. 27.) It can not profitably be, and never is, imported except for wrappers. (p. 28.) "If the whole bale was taken apart and every hand examined, it would be a decided injury to the tobacco, unless done with great care in a proper room and proper moisture and all that kind of thing. * * * It would have to be done with extraordinary care and great expense or else there would be a great injury." (p. 28.) The importation "was undoubtedly intended for all to be wrappers." (p. 29.) All these leaves are large enough for wrappers. (pp. 27, 28.)

3. *On the merits.* The importers' claim on the merits is based partly on testimony of A. Schroeder, one of the plaintiffs, and for the rest on the testimony of Frederick A. Wagenfuehr, William Roberts, Peter Mackin, and Simon Henry, offered as expert witnesses, the first named being also plaintiff's employee.

Mr. Schroeder testified that he was an importer and dealer in leaf tobacco; that leaf tobacco is divided into wrappers, binders, and fillers; that there are various grades of Sumatra tobacco, of which the lowest is mainly used for fillers or smoking tobacco; that "tobacco leaves are like the human face; no two are exactly alike." Witness further testified that the following considerations affected the size of the leaves in question: "That the leaf was either too small for a wrapper originally, or by being broken or torn so the parts of the leaf on one or both sides of the stem were not suitable for wrappers. The size of the leaf which is suitable for wrappers is affected by the attacks of insects in its growth,

by rust caused from dewdrops, and by the sun burning and destroying a part of the leaf; by storms whipping the leaf as it stands in the field and breaking off parts of it by overheating while the tobacco is curing in the shed, thus destroying so much of the texture that parts of it drop off before the tobacco reaches the market. A good deal of the leaf is destroyed by handling in transportation." (p. 17.) "Some lots are a great deal more eaten by insects than others. Some are, in the language of the trade, almost perfect. Whether the eaten leaves are thrown out or not depends upon the persons who put them up on the plantation." (p. 19.)

Testifying with regard to the particular bales in question, witness stated that less than 85 % of the weight or surface of the leaves in the bales represented by samples 1524 and 1679 was "suitable for wrappers;" that as to the bales represented by samples 1564 and 1760, there was "85 % of the surface of the leaf suitable for wrappers and less than 78 % of the weight suitable for wrappers." (p. 18). The two former samples represented five bales and the two latter samples five bales out of the importation in question. (p. 14.) The samples used by Schroeder, however, were not those drawn by the customs officers. (p. 17.) Schroeder does not state how largely his objection is based on insect-eating, etc., as distinguished from considerations affecting the original size, weight, and fineness of texture of the leaf.

The other four witnesses above mentioned testified concerning two samples, one from bale No. 1679, the other from bale No. 1524. Only one sample was shown to

witnesses out of each bale; nor was that sample one of those drawn by the custom-house officials. (p. 17.) The witnesses testified that less than 85 % of the samples shown them were fit for wrappers. (pp. 20, 21.) The defects found by them are various. "Some were too small, some were broken, some had large holes in them, worm-eaten; some were what we call flea-bitten, a few were of coarse, thick texture." (p. 21.) The examination was made by these witnesses in January, 1890, fourteen months after the goods were imported.

Part of the tobacco in question was sold by plaintiffs to a Philadelphia firm, whose superintendent was called as a witness; but he was unable to "state definitely whether 85 % was suitable for wrappers." Defendant called two dealers, who testified that Sumatra tobacco is only imported for wrappers, and with very few exceptions is fit for that purpose. They examined one of plaintiff's samples, and testified that if the leaves had not been broken over 85%, if not all, should have been suitable for wrappers; and that it was impossible to tell whether the defects had occurred since the hands were taken from the bale. (pp. 27–29.)

PAST INTERPRETATION OF THE TARIFF PROVISION.

The provision was new in the tariff of 1883, and at once raised important questions with regard to the standard by which the percentage of suitability should be estimated, whether the 85 % referred to the invoice, bale, plantation lot, hand, or leaf.

The first question arising was whether the unit was the single package or the whole invoice. Assistant Secretary French decided "that the limitation of 85 % refers to each package and not to each invoice" (Syn. Dec. 5715, May 18, 1883.)

A question then arose whether the bale itself was not too large for the unit of measurement. G. Falk & Company, of New York, partly at the suggestion of the customs officials, therefore imported from Holland a bale containing about 82 % suitable for wrappers and 18 % not suitable for wrappers. Each hand contained, or was assumed to contain, only one class of tobacco. The two classes were "in bundles or hands easily distinguishable from each other, and readily separable by any one having the knowledge of the different qualities of tobacco" (Syn. Dec., 1884, p. 196). In fact, the hands of the 75 cent tobacco were separated from the others by strips of paper or cloth so as to be readily distinguishable and separable. The cheaper tobacco had been intentionally substituted in Holland in the bale to an amount just sufficient to raise the question.

The question was submitted to the Treasury Department and referred to Attorney-General Brewster for his opinion, which is reported at 18 Op., 1, and also incorporated in the letter of Secretary Folger (Syn. Dec., 6324, May 1, 1884). Briefs were filed on both sides of the question and carefully considered. Messrs. Brewster and Folger concurred in overruling the claim of the importers that the bale or package was the unit, and the case having been taken to the courts this decision was finally con-

firmed by the Supreme Court of the United States. (*Falk* v. *Robertson*, 137 U. S., 225.)

Assistant Secretary French, on December 10, 1884 (Syn. Dec., 6674), confirming the Department's decision in the Falk case, said that "the extent of the examination required must necessarily be left to the judgment of the appraiser." Assistant Secretary Fairchild, February 3, 1886 (Syn. Dec., 7350), reaffirming the rulings, directed that at least one bale out of every ten be thoroughly examined.

> You will require at least one bale in ten of every invoice to be thoroughly examined by the appraiser, and, if tobacco subject to the two different rates of duty be found therein, that the quantity of each be ascertained by an inspection if possible, or if not by inspection, then by an actual assorting of the hands, and that the proportion of each sort so ascertained shall determine the proportionate parts of the whole invoice for the purpose of classification at the different rates of duty. In case importers object to the opening and actual examination of such representative bales the whole quantity should be assumed to contain wrapper leaf tobacco of the class paying the highest rate of duty.

This thorough method of investigation was objected to by the importers on the ground that actual assortment of the hands was "almost destructive to the merchandise." The appraiser therefore suggested that "a proper classification of such tobacco can be reached by drawing indiscriminately not less than ten hands or more, if in the judgment of the examiner the same be necessary, from each representative bale; separately counting and weigh-

ing these hands and taking the proportion of light and heavy hands so found, for the purpose of determining the proportion for the whole bale or lot." This suggestion was indorsed by the collector on the ground that "the law does not contemplate such an examination by the appraiser as will destroy or even damage imported merchandise, if avoidable;" and on the collector's recommendation Assistant Secretary Maynard authorized him to adopt the proposition of the appraiser. (Syn. Dec., 8299, June 20, 1887.)

The question having come up again from Texas, it was again ably considered by Assistant Secretary Maynard (Syn. Dec., 8368, Aug. 1, 1887). Mr. Maynard decided that the unit was the leaf itself. He says:

> Every leaf, 85 per cent of which is suitable for wrappers and the weight of which is such that more than 100 such leaves would be required to weigh a pound, is declared to be liable to the high rate of duty. * * * The weight is not to be determined by hands or packages or bales, but by leaves. * * * It has been suggested that it would be difficult, if not impracticable, for the appraiser to adopt the leaf as a unit, but it is not believed that such an objection rests upon tenable grounds. * * * And the method adopted, as I understand it, is to take one or more bales, according as in the judgment of the appraiser it may be necessary, which would be regarded as representing the entire importation, and out of such bale or bales to draw at least ten hands or packages which would be regarded as representing the bale, and then to examine each of these hands or packages and ascertain how many leaves in each are of the requisite quality for wrappers and of such weight that more than 100 would be required for a

> pound, and the proportion of such leaves so ascertained may properly be regarded as representing the quantity of such leaf tobacco in the entire importation.

The above decisions have been criticised as contradictory, but they contain no real contradiction. The question came up first as between the invoice and the bale, next as between the bale and the hand. The method prescribed by Mr. Fairchild (assuming the leaves to be of uniform weight in each hand) was such as to insure absolutely correct results. The change subsequently made, by which the ten hands drawn were assumed to represent the whole bale, was at the request of the importers themselves, because a thorough investigation was injurious to the property.

The position thus finally arrived at by the Department was substantially the same as the position taken by these importers in the second paragraph of their protest in this case: "We claim that in ascertaining the grade of the raw tobacco for purpose of classification the leaf should be taken as the unit of quantity;" and in the third paragraph that "the hand should be taken as the unit of quantity."

The importations in the case at bar were subsequent to the last of these Treasury decisions. The Supreme Court decision in the *Falk* case, however, was subsequent to the trial of this case. In the *Falk* case Mr. Justice Blatchford refers to the contention of the importers as follows (137 U. S., at p. 232):

> They contend that the unit upon which the 85 per cent is to be calculated is the entire bale. But

> we can not agree with this view. The statute does not refer to tobacco in bales. * * * *The unit is not the bale, but is the separated quantity of such leaf tobacco.* That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was evidently only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market. It appears * * * that *prior to the act of* 1883 * * * *inferior tobacco was not imported in the same bale with such Sumatra tobacco.* The unit of the statute, therefore, must be held to be *leaf tobacco wrappers* answering the description which, when reaching the named percentage, is subject to the duty of 75 cents a pound.

After referring to certain statutes cited by appellant, he adds:

> There is nothing in these provisions which shows that the 85 per cent in question is to be regarded as meaning 85 per cent of the entire contents of a package containing *separable* and *separated* quantities of leaf tobacco of two different qualities and subject to two different duties.

In this case it was assumed that the quality of each hand would be uniform; and the hand seems to be considered the unit of quantity. The court expressly found (p. 234), that there was no attempt to deceive, and the fact that the inferior tobacco had been purposely inserted does not seem to be the ground of the decision. Nor

does the fact of the separation of two kinds of hands by strips of paper or cloth seems to be regarded as an essential element in this opinion. *Separability* and *actual separation* are made the tests.

In re Blumlein (49 Fed. Rep., 228), was decided by Judge Wheeler January 5, 1892, holding that the bale was the unit of quantity. A similar decision was made by Judge Shipman in *Soby* v. *Hubbard* (49 Fed. Rep., 234), on January 27, 1892. The latter case was taken to the Supreme Court, but the writ of error was dismissed for lack of jurisdiction (*Hubbard* v. *Soby*, 146 U. S., 56). Both cases were then taken to the circuit court of appeals, and the judgments affirmed (49 Fed. Rep., 383, 388), by Judges Wallace and Lacombe.

In both of these cases the Government strenuously insisted on a plain and literal interpretation of the statute, arguing that it did not refer to mixed lots of tobacco, but described a certain quality of leaf, namely, a leaf weighing less than $\frac{1}{100}$ of a pound, and of which 85 per cent, or $\frac{17}{20}$ was of the fineness suitable for wrappers, while large enough for that purpose. The court, however, gave a violent construction to the provision, making the 85 per cent refer to the weight, as well as the size and fineness.

The knot was summarily cut by Congress in the act of October 1, 1890, as follows (par. 242):

> Leaf tobacco suitable for cigar wrappers, if not stemmed, two dollars per pound; if stemmed, two dollars and seventy-five cents per pound: *Provided*, That if any portion of any tobacco imported in any bale, box, or package, or in bulk, shall be suitable for cigar wrappers, the entire quantity of

tobacco contained in such bale, box, or package, or bulk, shall be dutiable, if not stemmed, at two dollars per pound; if stemmed, at two dollars and seventy-five cents per pound.

ASSIGNMENT OF ERROR.

Defendant at the close of the testimony moved for the direction of a verdict in his favor, and upon the denial of this motion asked to go to the jury generally upon the issues of the case, and also upon a specific question. The court, on the contrary, directed a verdict for plaintiff, to which direction exception was duly taken (p. 29).

We assign this direction for error.

ARGUMENT.

I.

The importers succeeded in this action through their claim that the customs official violated the law and nullified all his own proceedings by examining only about one in fourteen instead of one in ten of the bales constituting this importation. They base their protest in this regard upon section 2939 of the Revised Statutes, and claim that if, by some error of a subordinate officer, one bale too few is opened for examination, it relieves them from paying the proper duties on the goods, even if they call no attention to the omission at the time.

The objection, although successful in the court below, is absolutely technical, and the action of the customs official was a benefit rather than an injury to these plaintiffs. One of the ten bales in question was actually opened. The

others belonged to three plantation lots, each of which was represented by one bale opened and examined. Mr. Schroeder admits (p. 19) that each plantation lot is uniform in character. He admits that he made no objection because more bales were not opened, but complained, on the contrary, because the examiner opened as many as he did (p. 20). These proceedings were on November 19 (p. 10), and Mr. Schroeder does not seem to have changed his mind on this point until January 29 following (pp. 12, 14).

The general principle is familiar, and is stated by Mr. Justice Field in *French* v. *Edwards* (13 Wall., 506, 511), as follows:

> There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid.

It is laid down as the general rule in Endlich on Interpretation of Statutes, §437, that "statutes directing

the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation."

The first question, therefore, is: Did Congress intend the provision for examination of one package out of ten to be for the protection and benefit of the importer?

The cases of *Burgess* v. *Converse* (2 Curt., 216, affirmed in 18 How., 413), and *Ystalifera Iron Company* v. *Redfield* (23 Fed. Rep., 650), relied on by the court below in the case at bar, came up under the Tariff act of August 30, 1842, chapter 270, section 21 (5 Stat., 565). That section provided that at least one package out of ten should be designated by the collector from each invoice, "and a greater number, should he or either of the appraisers deem it necessary" for the purpose of examination. The statute did not by its own terms show whether these provisions were for the benefit of the Government and importer as well, or of the Government alone.

In *Burgess* v. *Converse* (2 Curt., 216) the question was referred to, but it did not become necessary to decide it. The question arose upon reappraisement, and it appeared that none of the packages had been examined or even seen by the merchant appraisers. What they saw on the 14th of June was some samples drawn by others on the 26th of April. Plaintiffs offered to prove that "this exposure of the samples would make a material improvement in quality," and thereby unfairly increase the valu-

ation. Mr. Justice Curtis said: "It is apparent that such an examination assumes what the appraisers had no right to assume, that the samples not selected by themselves fairly represent the whole invoice." The jury were instructed "to find whether the examination actually made by the merchant appraisers was in substance and effect equivalent to an examination of at least one package in ten of the goods, and if it were not, to return a verdict for the plaintiff." The judgment for plaintiff was affirmed by this court in the case reported as *Greely's Administrator* v. *Burgess* (18 How., 413), Mr. Justice Campbell quoting the statute and saying: "The jury have found that the inquiry they made was not in substance nor in effect an equivalent for such an examination."

It was doubtless the opinion of both the judges in the case last cited, although not necessary to a decision, that the provision for the examination of one package out of ten, as well as the provision for an actual examination by the appraisers themselves, was essential to the validity of an appraisement under the act of 1842. Judge Shipman, in *Ystalifera Iron Company* v. *Redfield* (23 Fed. Rep., 650), considering the same statutory provision upon a motion made in 1883 for judgment on a verdict rendered in 1856 (110 U. S., 174), decided the point expressly, citing the above cases and also *Greely* v. *Thompson* (10 How., 225), *Stairs* v. *Peaslee* (18 How., 521), and *Belcher* v. *Linn* (24 How., 508), none of which latter seem to be on the point.

Judge Lacombe follows these decisions as if the statute now in question were the same as that then con-

strued. The statute, however, is now in different form and shows most conclusively that the provision for examination of one bale in ten is solely for the benfit of the Government and not at all for the benefit of the importer. Section 2939, upon which the importers rely, reads as follows:

> The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. *When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.*

When the point was raised before Mr. Justice Curtis in *Burgess* v. *Converse* (*supra*), he said (p. 221):

> It is insisted by the district attorney that this is merely directory to the collector for the protection of the revenue from fraud. No doubt this was one purpose, and I think the leading purpose of the section. But can I say it was its sole purpose?

Had the Revised Statutes, instead of the act of 1842, been before him, there can be no doubt that he would have answered this question in the affirmative.

Until, therefore, the Secretary of the Treasury directs a less number of packages than one in ten to be examined it was the duty of the customs officers to examine the full number required by the statute; but this provision was

inserted only to "amply protect the revenue," and as it was not for the benefit of the importer he could take no advantage of its violation.

In the case of this Sumatra leaf tobacco, however, the examination of a less number of packages fully complied with the statute, because the Secretary *had by special regulation directed a less number of packages to be examined.* This appears from the letter of August 1, 1887 (Syn. Dec. 8368), put in evidence by plaintiffs and contained in the record at pages 21–23.

Assistant Secretary Maynard, discussing the method of examining wrapper leaf tobacco, says: "The method adopted, as I understand it, is to take *one or more bales, according as in the judgment of the appraiser it may be necessary*, which would be regarded as representing the entire importation, and out of such bale or bales to draw at least ten hands," etc. He expresses his approval of this practice; and, referring to an application by plaintiffs for a modification of the instructions heretofore given on this subject or the issuance of further or more explicit instructions, and stating that all parties interested have been heard and the arguments presented upon both sides fully considered, he says: "It is believed that the decision above rendered covers all the points involved in such application, and the Department declines to issue any other or further instructions upon the subject than what are contained in this decision and the decisions heretofore rendered upon the subject, which are modified so far as they may be in conflict herewith." Plaintiffs themselves

introduced this letter as a regulation of the Treasury Department; nor is it necessary to prove that the Assistant Secretary in charge of the customs department has authority to act for the Secretary within his province. That fact is presumed. (*United States* v. *Adams*, 11 Sawy., 103.)

The previous decision, requiring one bale in ten to be completely taken to pieces and examined, is, therefore, to be treated as modified.

For another reason, also, the application for the direction of a verdict on this point should have been denied. "A party may waive any provision, either of a contract or of a statute, intended for his benefit." (*Shutte* v. *Thompson*, 15 Wall., 151, 159.) It is respectfully submitted that such an irregularity as this is one that is waived by not objecting at the time, especially when the importers admit that the bales actually examined are a fair sample of the whole lot; and then, when it further appears that the importers actually requested the examination of a less number of bales than were being examined, their present contention is reduced to an absurdity.

It may be doubted whether section 2939 applies at all, except in cases of appraisals for *ad valorem* duties. In the *Soby* case the importers' counsel insisted that it does not apply to a case like the one at bar.

II.

Assuming, therefore, that the collector sent bales enough to be examined, and that the reason assigned by the court

for directing a verdict was insufficient, it remains to consider whether the verdict can be sustained on any other ground.

One of plaintiff 's claims seems to have been based on the ground subsequently taken in the *Blumlein* and *Soby* cases, above referred to. We quote from the protest (pp. 13–14):

> Ninth. That if it be held that the hand is the legal unit of quantity, then if there is not 85 % *of hands* which contains 85 % *of leaf* of the requisite size, texture, and lightness as aforesaid in a bale, the *whole bale* is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under said limit.
>
> Tenth. That if it be held that the bale is the legal unit of quantity, then if there is not 85 % *of the bale* in an invoice which contains 85 % *of leaf* of the requisite size, texture, and lightness as aforesaid, the whole invoice quantity is dutiable at no more than 35 cents per pound, and we claim that said tobacco is under said limit.

Mr. Schroeder's own computations, on page 18, are upon this theory, taking the bale as the unit. He claimed also that the percentage should be taken by weights and not by leaf surface. Thus one of the bales upon which the verdict was based was numbered 1564; appraised as 70 % at 75 cents and 30 % at 35 cents (pp. 25, 26). Schroeder admits that 85 % of the leaf surface in this whole bale was 75-cent tobacco, but claims that not over 78 % of the weight could be so classified (p. 18), and hence that the whole bale was dutiable only at 35 cents per pound.

If the protest is in proper form to raise the point, then this case turns upon the correctness of *In re Blumlein* and *Hubbard* vs. *Soby*.

The Revised Statutes (§ 2931) provide that the importer's protest shall be a "notice in writing * * * setting forth therein, distinctly and specifically, the grounds of his objection." This provision has been very liberally construed, but no authority gives the importer the right to take at the same time absolutely inconsistent positions; as here where he claims the leaf, the hand, the bale, and the lot each to be the unit, in order to upset the duty if possible, however the court may thereafter construe the law.

It is submitted, however, that the *Blumlein* and *Soby* cases were incorrectly decided; that the bale is not the unit of quantity; that Assistant Secretary Maynard correctly interpreted the statute; that paragraph 246 does not contemplate mixed lots of tobacco, but describes a certain species of leaf constituting a known article of commerce; and that the percentage clause is used only as establishing a test of size and fineness by which the species could be identified.

This construction peculiarly fits the language of the paragraph. The language was evidently very carefully selected. The noun "leaf tobacco" is qualified by two coördinate descriptive clauses: "of which 85 per cent is of the requisite size," etc.; "of which more than 100 leaves are required to weigh a pound." The percentage has nothing to do with weight. It pertains merely to the size and texture of the leaf. The leaf is to be $\frac{85}{100}$ fit

for wrappers—less than $\frac{15}{100}$ too coarse, and the balance large enough for the purpose. It is at the same time to be a very thin, delicate wrapper—less than $\frac{1}{100}$ of a pound in weight, even before the coarse wastage is cut away. The provision that the leaf is to be less than one one-hundredth of a pound in weight applies to the whole mass of the leaf tobacco, the 15% as well as the 85%.

The percentage test of texture is used just as tests of quality were used in other parts of the same tariff act, as "alcohol containing 94% anhydrous alcohol;" "opium containing 9% and over of morphia;" "sulphur ore * * * containing not more than 3½% of copper;" "molasses testing not above 56° by the polariscope;" "cotton cloth * * * not exceeding 100 threads to the square inch, counting the warp and filling."

The learned judges of the circuit court torture the language of the paragraph to arrive at its supposed meaning. *In re Blumlein* (49 Fed. Rep., 228), the record showed "that *all* the tobacco was of the requisite size and necessary fineness of texture to be suitable for wrappers;" nevertheless Judge Wheeler held that the decision of the appraisers should be reversed on the importers' appeal, because less than 85 per cent of the whole bale was of the requisite lightness. Judge Lacombe, on appeal, said: "The appellant further contends that the 85 per cent clause refers only to size and fineness. We do not so read the statute." (55 Fed. Rep., at p. 387.)

Judge Lacombe was influenced by the notion that to establish the leaf as the unit would require an exhaustive investigation and measurement of each leaf, so that the

thing would become an absurdity. No such difficulty appeared in the case before him, where it was found, as above stated, that every leaf was large and fine enough to come under the 85 per cent clause. The evidence in the case at bar shows that his notion was a mere bugaboo, unless we take the strained construction that injuries from insects, from fraudulent or defective packing, or from the voyage affect size and fineness within the meaning of the statute, a point hereinafter discussed. The standard texture is a texture common to all Sumatra tobacco that is imported. (Record, pp. 27, 28.) The size of the Sumatra leaves is also ample. "One side of the leaf wraps *from one to four* cigars" (p. 18).

On the other hand, the learned judge's construction attributes to Congress a most improbable degree of faith in human nature. A duty that can be avoided by judicious intermixture of inferior tobacco in the outside "hands" of a bale is a duty impossible to enforce. It is the tendency of importers to construe general language of description in a particular and distributive sense so as to enable themselves to affect its application to each given case by mixture of goods in the bale, by testimony as to the intent or actual use of the importation, etc., as exemplified recently in the manure case. (*Magone* vs. *Heller*, 150 U. S., 70.) It is respectfully submitted that the courts should not lean toward such a principle of interpretation.

In construing statutes it is proper to consider the mischief sought thereby to be remedied, and information as to matters of fact in this regard may be sought from the

debates of Congress. (*American Net and Twine Company* vs. *Worthington*, 141 U. S., 468, 473–474, and cases cited by Mr. Justice Brown.) The original form of the bill is also proper subject for consideration, when the clause under consideration came in by way of amendment. (*Blake* vs. *National Banks*, 23 Wall., 307.)

The paragraph here under consideration was not recommended by the tariff commission of 1882, or proposed by the House, but was inserted in the Senate. It was incited by the sudden appearance in the trade of Sumatra wrapper-leaf tobacco, weighing not over a third as much as an equivalent amount of the Connecticut article. The trade began in 1880, and it was found that the Sumatra tobacco, with other advantages, "can be worked advantageously as a wrapper for cigars in the proportion of 4 pounds per 1,000 cigars, as against 12 or 14 pounds of American tobacco required to make 1,000 cigars" (Cong. Record, Feb. 1, 1883, p. 1899). It was "as fine as silk, very beautiful" (*Id.*). While it was found in other East Indian and Asian countries (p. 2567), yet the present importations were from the island whose name it familiarly bore; but treaty obligations would be apparently, at least, violated, by giving its familiar name instead of its description, in the statute (p. 1900); while the familiar name would prove too restrictive in case importations should begin from neighboring islands also. On the other hand, the general words "wrapper tobacco," or "tobacco suitable for wrappers," would injure a great industry by prohibiting the importation of the coarse Cuban leaves for that purpose.

Mr. Sherman, of Ohio, moved to insert the following clause (p. 1897):

> Tobacco in leaf unmanufactured and not stemmed, used exclusively for wrappers, 75 cents per pound.

Mr. Hawley, of Connecticut, moved to amend as follows (p. 1897):

> Tobacco in leaf, unmanufactured and not stemmed, when the greater portion of the bale, box, or other package is suitable for wrappers, 75 cents per pound upon the whole contents of said bale, box, or other package.

This was reported with slight change by the Committee of the Whole, but called forth a protest from the manufacturers using Havana wrappers (pp. 2557–2558). One of these manufacturers then drew "a description of the tobacco leaf" which was proposed as a substitute by Mr. Platt, of Connecticut, and was adopted by the Senate, being the paragraph here under consideration (pp. 2564–2568). The Senate acted upon information imparted through Mr. Platt, that Sumatra tobacco leaves never weighed less than $\frac{1}{130}$ of a pound each (p. 2564).

The arguments of the Senators we can not appeal to (*United States* v. *Union Pacific R. R. Co.*, 91 U. S., 72). The information laid before them shows that they must have been endeavoring to define a new article of commerce. The abandonment of the bale as a unit of quantity is significant.

The *Falk* opinion, indeed, while using expressions in accordance with our theory of the act, rested itself at last upon a theory assuming that the paragraph applied to

mixed goods; but it is to be remembered that the question then before the court did not necessitate the adoption of the correct theory.

IV.

Nor does the question now before the court.

If it be conceded that paragraph 246 refers to mixed goods, nevertheless, under the case of *Falk* vs. *Robertson* (137 U. S., 225), then the hand, if not the individual leaf, is the unit of quantity. The opinion in that case, so far as material, is set forth hereinabove, in connection with the Treasury decisions under this law. It demands, for the required units, "separable and separated quantities of leaf tobacco of two different qualities" (p. 233). This demand is satisfied by the hands. No sentence of the opinion makes the separation of the two sets of hands in that case an essential element. Why should the strips of paper, loosely laid between the layers, be considered a sufficient separation while the tying of the hands is considered not to be a separation? Why does the circuit court demand that the so-called "commercial unit" shall be deemed the congressional unit? There is no identity in object between the two units.

The *Falk* case would be a slight protection against fraud if it could be evaded merely by shuffling the hands.

V.

But whatever the unit, it is submitted that defendant should have had a verdict on the ground that they were

invoiced at an average price, and that the method adopted by the custom officials was over-favorable to the importers.

Section 2910 of the Revised Statutes provides that—

> When merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject.

This act is to be read as part of the same general system of laws with the act of 1883 (*Saxonville Mills* vs. *Russell*, 116 U. S., 13, and cases cited).

The strict definition of the word "average," requiring exactness of mathematical calculation, can not be the meaning of its use in this statute. The statute is evidently intended to compel a particularized report to the customs officers of the make-up of an invoice of mixed values. It can not be that the statement of a correct average would subject the importer to payment of duty on the whole lot at the highest rate, while the statement of an incorrect average would not.

The strict definition of the word is not the only one. The Century Dictionary defines it also as follows:

> Any medial amount, estimate, or general statement based on a comparison of a number of diverse specific cases; a medium.

Webster gives substantially the same definition.

That the importers in the case at bar may have given the lowest rate instead of a "medial amount" can hardly absolve them. To give the statute reasonable effect it must

be so construed as to apply to all importations of mixed goods invoiced as if uniform in value.

Mr. Schroeder objected that the examiner did not measure and test the leaves to ascertain whether 85 per cent was fit for wrappers. The defendants' answer is that all the leaves were suitable for wrappers within the meaning of the statute, and that measurement would have been a needless superfluity. The testimony of defendants' witnesses at least raises a question for the jury on this point.

VI.

Mr. Schroeder also objected that the hands should have been weighed by a weigher instead of by the examiner, referring to section 2890 of the Revised Statutes. We are unable to perceive the point of this objection. *In re Blumlein* (49 Fed. Rep., 228, 232), Judge Wheeler said: "It is said that it ought to have been weighed by a United States weigher, but I do not think so. When it is getting at the classification of the goods, I do not think that is necessary. I do not see but that they proceeded regularly in ascertaining what these goods were."

VII.

A further objection was made to the method of computation adopted by the liquidator at the custom-house after receiving the examiner's and weigher's returns.

As to this objection, plaintiffs assume that a hand of the heavier leaves is heavier than a hand of the lighter leaves, and, hence, that the liquidator's method of computation was unfavorable to them; and for this alleged

slight error in computation they desire to get out of paying their duties altogether.

The first criticism to be made upon this objection is that the protest did not distinctly or specifically state it, as required by section 2931 of the Revised Statutes. On such objections the protest should be clear enough to indicate to the collector what the importer is driving at, so that errors in calculation can be corrected.

At the trial plaintiffs maintained that the liquidator erred in his method of applying the examiners' estimates to the weighers' report. If plaintiff is right, some slight readjustment of calculations would be necessitated. There is nothing in the protest, however, that would call the attention of the collector to this question, and therefore the protest is insufficient to raise it. (*Davies* v. *Arthur*, 96 U. S., 148; *Norcross* v. *Greely*, 1 Curt. 114; *Burgess* v. *Converse*, *supra*; *Thomson* v. *Maxwell*, 2 Blatchf., 385.)

But there is no evidence—certainly no evidence that would bind a jury, and therefore authorize the direction of a verdict—that the liquidator's method of calculation was not fair, and, indeed, favorable to the importers. Mr. Schroeder, one of the plaintiffs, testified that there were about the same number of leaves in each hand, so that the hand containing the heavier leaf weighed the more. His testimony, however, was affected by his own great interest in the result, as below shown, and it was contradicted by the only actual instances produced by his own witnesses. His sample No. 1679 contained 122 leaves, while his sample No. 1524 contained 151 leaves (pp.

20–21). On such evidence the case could not be taken from the jury. The probability is quite as great that the hands were uniform in size and weight as that they were uniform in the number of leaves. The probability is, therefore, quite as great that the computation was approximately accurate as that it was slightly unfair to the importers. But the burden is on the importers to show that the liquidator did wrong. (*Arthur* v. *Unkart*, 96 U. S., 118.)

The whole system was favorable to the importers, because the leaves were weighed in the unstemmed condition, whereas it is evidently their weight in a stemmed condition that is contemplated by the statute; for the test of 100 leaves to the pound is applicable alike to the stemmed and the unstemmed tobacco. The stem is admitted to be over 20 per cent of the leaf in weight (p. 18). The benefit of this large fraction was given to the importer by the custom-house officials. It is perhaps for this reason that Senator Platt's prediction as to the weight of the leaves proved a failure, and that this unexpected controversy has arisen.

The examination made was more thorough, if anything, than the usual examination made by the wholesale trade as shown by defendants' witnesses. Sometimes not more than four hands, and never more than ten hands, are drawn by the trade. It is, indeed, customary to take a hand or two for "casing," that is, moistening, and carefully examining for defects. This, however, is not to ascertain the size and fineness of texture, for in these respects all Sumatra tobacco is suitable for wrappers,

according to these witnesses. It is to ascertain what quality of wrappers the leaves are fit for. Wrappers, like other things, are good, bad, and indifferent, fine and superfine. Some are for cheap cigars, others for expensive articles. A method of examination which is considered sufficient in the trade is sufficient for the custom-house officials. (*Sampson* v. *Peaslee*, 20 How., 571.)

But no objection was made to the drawing of ten hands, in accordance with commercial usage, instead of breaking up and injuring the whole bale. In fact, Mr. Schroeder had the bale tested in precisely the same way by professional samplers for his own purposes.

VIII.

Plaintiffs fail to show that they were overcharged.

The presumption is with the collector (*Arthur* v. *Unkart*, *supra*), and the testimony of plaintiff's witnesses does not bind the jury. One of these witnesses is the plaintiff, Schroeder, himself. The others are persons called as experts, one an employee, testifying only to a matter of opinion, namely, suitability. Upon such testimony a verdict can not be directed.

It is undoubtedly well settled in this court, as in others, that a verdict can and should be directed in favor of the party whose contention is established by uncontradicted, disinterested, and unimpeached witnesses, testifying to matters of fact as distinguished from matters of opinion, and whose testimony does not grossly violate the probabilities of the case; or in favor of the party with whom

the presumptions lie, when no competent evidence is offered to rebut them; or even upon uncontradicted and unimpeached testimony of an interested party when he is called to the stand by his opponent; or upon admissions of an interested party against his own interest, as is common upon the issue of contributory negligence.

But it is also well settled that expert testimony as to values does not bind the jury. The experts may testify as to facts and give their opinion thereon; the jury may take the facts and give their own opinion. (*Murdock* v. *Sumner*, 22 Pick., 156, 158, approved by this court in *Head* v. *Hargrave*, 105 U. S., 45, 51; 1 Wharton on Evidence, pp. 447, 454; *United States* vs. *McGlue*, 1 Curt., 1, 9; *Fletcher* vs. *Seekell*, 1 R. I., 269; *Anthony* vs. *Stinson*, 4 Kans., 211; *City of St. Louis* vs. *Ranken*, 95 Mo., 189; *Bee Printing Company* v. *Hichborn*, 1 Allen, 63, 65; *McReynolds* vs. *Railroad Company*, 106 Ill., 152; *Johnson* vs. *Railroad Company*, 37 Minn., 519.) "The rule is that if the court admits the testimony, then it is for the jury to decide whether any, and if any, what, weight is to be given to the testimony." (*Spring Company* vs. *Edgar*, 99 U. S., 645, 658.) The principle is most familiarly applied to legal and medical expert testimony, but is not confined to these departments. The case first above cited concerned proof of value of chattels attached. The rule is, indeed, sometimes very broadly laid down. "The opinions of experts, however intelligent and trustworthy, do not bind the conscience of the court." (*The Iberia*, 40 Fed. Rep., 893, 897; Lawson, Expert and Opinion Evidence, p. 240.) It is not necessary to go so far, how-

ever, for the purposes of the case at bar, which falls within the principle of the cases first above cited. The experts were called upon a question of "suitability," which is substantially one of value. Had they stated the facts upon which their opinions were based, as the actual size of the leaves, the size of the leaf in the average cigar wrapper, etc., the jury might have been bound by these facts so far as uncontradicted. But they gave merely opinions, which the jury were at liberty to disregard.

The testimony of Schroeder, the plaintiff, would have been inadmissible at common law. The common law presumed conclusively that he would lie. This rule has been changed by statute; but the statute has not gone so far as to bind the jury by his testimony if uncontradicted. The question first arose in the State courts of New York, in cases where the testimony offered was not only that of an interested party, but also more or less improbable. (*Elwood* v. *Western Union Telegraph Company*, 45 N. Y., 549; *Kavanagh* v. *Wilson*, 70 N. Y., 177, 179.) The court on both grounds held the testimony not controlling, and its opinions were quoted, approved, and applied by this court in *Quock Ting* vs. *United States* (140 U. S., 417, 421, 422. See also *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63.) The New York courts have since laid down the rule plainly that the court can never take a case from the jury on the uncorroborated, although unimpeached and uncontradicted, testimony of a party or interested person, and that a request for a finding based on such testimony does not necessitate an affirmative answer. (*Gildersleeve* vs. *Landon*, 73 N. Y., 609; *Dean* vs. *Metropoli-*

tan Elevated Railway Company, 119 N. Y., 540, 549, 550; *McNulty* v. *Hurd*, 86 N. Y., 547; *Honegger* v. *Wettstein*, 94 N. Y., 252, 261; *Canajoharie National Bank* v. *Diefendorf*, 123 N. Y., 191, 200.) It is respectfully submitted that this doctrine is unassailable, and should be borne in mind in examining the present record. "The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added." (Rapallo, J., in *Elwood* vs. *Western Union Telegraph Company*, *supra*, at p. 554.) It may be that a verdict against the testimony of interested witnesses, though supported by the presumptions in absence of testimony, might be set aside, in the discretion of the court, and a new trial ordered as against the weight of evidence; but that would not authorize the direction of a verdict (*Hedden* vs. *Iselin*, 142 U. S., 676, 680), as if the verdict were without either presumption or evidence to support it.

The witnesses are contradicted in important points by the defense. The four witnesses produced to support Schroeder, whose testimony is given at pages 20 to 21 of the record, examined only two samples, which were *not samples that had been drawn by the examiners*, but samples that had been drawn by a firm of samplers under direction of Schroeder (p. 17). It is entirely consistent with probability that these two samples, one from each of two out of the ten bales, were not at all fair tests of the bales from which they were drawn. The Government caused ten hands to be drawn, adopting the most thorough mode

of examination known to the Treasury. These ten hands should have been the subject of whatever investigation Schroeder desired to make, because they were by the usage both of commerce and the custom-house the representatives of the whole package. Moreover, these samples were examined many months afterwards, and it should have been left to the jury to consider whether the test under these circumstances was a fair one. It was these two very bales, Nos 1524 and 1679, that were sold to Bowles, Clymer & Co., of Philadelphia, whose superintendent, subpœnaed by the importers, was unable to say whether or not 85 per cent was suitable for wrappers. (p. 26.)

Moreover, the examination made by Schroeder and his experts throws no light on the case, because they adopted a wrong interpretation of the statute. The statute does not make general suitability for wrappers the test, but merely the size of the leaf and its fineness of texture These witnesses went into the question whether the leaves in the samples examined by them so long afterwards were torn or broken or worm-eaten or flea-bitten. They went into the general question of suitability, as if the specifications as to size and texture had not been found in the act at all. It is respectfully submitted that Congress had no intention to require an examination of the leaves of the various hands for such purposes. Congress laid a general duty on tobacco of a certain size, weight, and texture. The language used by Congress, according to the testimony of defendant's witnesses (and by this testimony the court is governed upon a motion by plaintiff for the direction of a verdict), is broad enough to cover all Sumatra

tobacco; and if any Sumatra leaves were so injured as not to be fit for wrappers, then their purchase by the importer was induced by fraud or mistake.

This is admitted substantially by Schroeder himself. He says: "Some lots are a great deal more eaten by insects than others, and some are in the language of the trade, almost perfect. *Whether the eaten leaves are thrown out or not depends upon the persons who put them up on the plantation.*" (p. 19.) It is respectfully submitted that the size and texture referred to in the act is the size and texture of the perfect leaf uninjured by insects or other calamities. The importer's remedy for damages which should have been averted at the plantation is against his vendor, the Amsterdam merchant, who has his own remedy over against the planter. The importer's remedy for damages sustained during the voyage is pointed out in sections 2927 and 2928 of the Revised Statutes.

The act of 1890 throws no light on the former law in this respect. It drops, indeed, the specifications as to size, fineness, and weight, probably on account of the litigation to which they had given rise and which was then and still is undecided; but it raised the rate of duty 250 per cent, and provided a means of estimate which completely shut out any such claims as those made by the importer in the present suit.

It is respectfully submitted that the judgment should be reversed, and a new trial ordered.

EDWARD B. WHITNEY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1893.

JOEL B. ERHARDT, Collector, vs. FREDK. A. SCHROEDER ET ALS.	No. 211.

DEFENDANT'S BRIEF.

Statement.

In November, 1888, Messrs. Schroeder & Bon, the original plaintiffs, but defendants in error here, imported into New-York four hundred and twenty-nine bales of merchandise, which (it happens) was Sumatra tobacco; but the character of the importation is of small consequence with relation to the first point upon which we justify the direction of a verdict in our favor (Rec. 29, fol. 67) except as emphasizing the necessity for giving it the examination prescribed by law as the basis for an assessment of duty in excess of that indicated by the invoice, and placed on leaf tobacco generally; which examination was not accorded it.

As to the other grounds for directing the verdict rendered, the nature of the article is the important consideration.

The importers claimed their goods to be dutiable at thirty-five cents a pound (Rec. 12-13) under Schedule

F, act of March 3, 1883, placing that rate upon all "tobacco in leaf, unmanufactured and not stemmed" other than such as may, upon proper examination, be found to be "leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound;"—which special class of tobacco in leaf is dutiable, under the same schedule at seventy-five cents a pound, if imported unstemmed, and one dollar a pound, if stemmed. (22 Stats. 503 top.)

Our tobacco was unstemmed; *i. e.*, the stems had not been removed; but Mr. Erhardt, then collector, exacted seventy-five cents a pound duty, under the last-quoted provision, without having had made the requisite examination to ascertain whether or not the facts justified any such assessment.

Against this exaction Messrs. Schroeder & Bon protested (Rec. 12–14) and paid it under protest.

They protested, *inter alia*, that there had been no legal appraisal; that Rev. Stats. Sec. 2939, had not been complied with. (Rec. 12, fol. 30; 14 near top, item "Eleventh")

The statutory provision thus referred to reads;—

SEC. 2939. The collector of the port of New-York *shall not*, UNDER ANY CIRCUMSTANCES, direct to be sent for examination and appraisement less than one package of every invoice, and *one package*, AT LEAST, *out of every ten* packages of merchandise, and a *greater* number, should he, or the appraiser, or any assistant appraiser, deem it necessary.

When the *Secretary of the Treasury*, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, *he* may, by *special* regulation, direct a less number of packages to be examined."

Entirely disregarding this peremptory statute, addressed to this one official especially, the collector at

New-York (Mr. Erhardt's predecessor) designated only *five* bales (instead of the required 43 "*at least*") out of our 429 to be sent for examination (Rec. 15, fol. 36) and later, upon the appraiser's request, twenty-five more. *(Id.* 10.*)*

Upon the sixth day of May, 1889, Schroeder & Bon withdrew five bales and the next day five other bales of their tobacco, paying duty thereon under protest, and taking all proper steps to have the assessment judicially reviewed. (Rec. 11–12; 15.) These ten bales, involved in this action, were numbered on the invoice 1526 to 1529 inclusive; 1564; 1689; 1771 to 1774 inclusive. (Rec. 15.) There were various plantation lots and marks making up the 429 bales imported, a statement of these lots and marks being annexed (by somebody) to the invoice; whereby it appeared that bales Nos. 1524 to 1533 inclusive were of the plantation lot SB, 1; Nos. 1561 to 1570, lot C, 1; Nos. 1755 to 1774 lot E, 1; and Nos. 1679 to 1705 lot SC, 1. *(Id.)* Of the four plantation lots, bale # 1524 from SB 1 went to the public store; # 1564 from C 1; # 1760 from E 1; and 1679 from SC 1. *(Id.)* There these four bales were subjected to the illegal and insufficient examination hereinafter mentioned.

What these 'plantation lots' have to do with this case, under the law and upon the facts, we fail to perceive; but the appellant has thought advisable to incorporate this statement into the bill of exceptions. *(Ib.)*

It will be observed that the last-mentioned 'lot' (SC 1) consisted of twenty-seven bales, of which only one went to the public store for examination; of lot E 1, of twenty bales, but one was sent for examination; so it was a mere accident that out of the two other lots, of ten bales each, Nos. 1524 and 1564 were designated for examination. *(Ib.)*

Neither the collector nor the appraiser designated or examined with any reference to plantation origin; of which the law takes no notice.

With reference to the whole thirty bales, out of the 429 included in the invoice, the then examiner of tobacco states the course of (so-called) examination adopted by him thus;—

"The invoice in this case came to me for classification of the tobacco referred to in it. Of the thirty bales of the invoice in question in the public stores what I did was this;—I opened, for instance, No. 1760; drew out ten hands promiscuously from the bale; weighed each hand separately, and set the weight of each down separately on a piece of paper. I then counted the leaves of each hand and put the number down opposite the weight. There are 7000 grains in a pound. *If there were just a hundred leaves in a pound,* EACH *leaf would weigh just seventy grains* (?); therefore, by dividing the weight of the hand by *the number of leaves in a hand,* if the quotient was seventy or less, *that would prove there were in that hand just one hundred leaves or less* (?), and I would *classify the* HAND, in that event, at thirty-five cents, and set 35 down on the paper, opposite to the figures on the paper stating the number of leaves in the hand.

That HAND *I would treat as dutiable at thirty-five cents.* If the quotient resulting from the division of the weight of the hand by the number of leaves in it was over seventy, then *that showed there were over one hundred leaves in the pound* (?) and I would set down 75 opposite the number of leaves in the hand set down, and would treat THE HAND as dutiable at 75 cents.

I treated each of the ten *hands* in the same way, setting down on the paper the result as above stated. Then, if I found that *five of the ten hands had just one hundred or under, I classified fifty per cent of the weight of the* BALE, out of which those 'hands' were drawn, at 75 cents and fifty per cent of it at 35 cents per pound; and as I classified the bales, so I classified the *plantation-lot* to which the bale belonged.

Of this invoice, I *only examined the thirty packages* sent to the public stores. *The examination of each of them was similar to that I have described,* EXCEPT that where I clearly found at sight over a hundred leaves to the pound I classified them at 75 cents." . . (Rec. 15, 16.)

CROSS-EXAMINED. We used a table to aid us in determining the number of leaves from weight. These

hands were drawn from different parts of the bales. Every hand that is drawn injures the bale more or less. This tobacco was all wrapper tobacco. THE ONLY THING I HAD TO DETERMINE WAS AS TO THE WEIGHT. *The question of being suitable or fit for wrappers,* we could only determine by having a small factory to work it up. (Rec. 16.)

RE-EXAMINED. *There was a difference in weight between the different hands examined in almost every instance. We passed* ALL *Sumatra tobacco as suitable for wrappers,* and MADE NO EXAMINATION *as to whether eighty five per cent was of the requisite size or fineness of texture.* WE ASSUMED THAT, and passed *all* as suitable for wrappers" (IBID).

RE-CROSS. I NEVER *took as many as twenty* hands from a bale, *nor weighed all the hands.* I never untied the hands and separated the leaves. I counted the leaves without untying." *(Ibid.)*

RECALLED, he swore he did not weigh leaves from *all* the public-store bales; but only from that undefined number as to which *he* had doubts. *(Id.* 26.*)*

Plaintiffs' expert testimony showed that there were several classes of Sumatra tobacco; that class to which these importations belonged being 'blad' or 'leaf' tobacco, of which class the larger portion is usually suited to wrapper purposes; though tobacco-leaves are like the human face—no two alike.

Our invoice of 429 bales came as it was put up in the usual form upon the Sumatra plantation; except the customary outside linen covering put on in Amsterdam, where Schoeder & Bon bought it.

" *All of the tobacco in the particular bales which are the subject of our claim here was* NOT *of a size suitable for wrappers.*" . . (Rec. 17.)

Some of the causes affecting the size of the leaf were enumerated. *(Id.)*

Duplicate samples of the bales examined were produced, and the method of examination for sale was indicated. (Rec. 17, 18.)

It appeared that *a bale contains from six to seven hundred hands,* not adequately represented by eight or ten of them drawn therefrom. (Rec. 17 bottom.)

The plaintiff, Mr. Schroeder, further testified;—

"I have here samples of the four public-store bales from which the examiner drew samples for the government on the classification of the particular lots in respect to which we claim a refund. The lot of twenty-seven bales represented by samples No. 1679 DID NOT HAVE SIXTY PER CENT *of the weight, and* NOT OVER SEVENTY *per cent of the leaf surface suitable for wrappers*, regardless of the stem. In the lot of ten bales represented by sample 1524 there was not eighty per cent of the surface suitable for wrappers; regardless of the stem, not sixty-five per cent of the weight." (Rec. 18, fol. 42.)

In none of the four 'lots' hereinbefore mentioned was there an eighty-five per centum of the weight of the tobacco suitable for wrappers *(Ibid.)*; and as the commodity was bought, sold and dutied by the pound, the weight must be the test to which the percentage rule applies.

Upon four (Nos. 1526 to 1529 incl.) of the five bales withdrawn May 6, 1889, the duty of seventy-five cents a pound was paid; upon the fifth bale (No. 1564), of that withdrawal *sixty-three* cents a pound was paid;—*a rate no statute prescribes*—being the average of *thirty per cent of the bale* at thirty-five cents and seventy per cent at seventy-five cents a pound. (Rec. 18, bottom.)

"Hands containing more than a hundred leaves to the pound would invariably weigh less than the hands containing less than that number. The hand containing the heavier leaf weighs the most, the hand containing the lighter leaf would weigh the least; as a rule, there are about the same number of leaves to the hand, whether the leaves are light or heavy." (Rec. 19, fol. 45.)

Mr. Schroeder stated the governmental method of examination pursued by the appraiser, examiner, and porters, in his presence; and that when he was appealed to, to say whether or not he thought it right, he told the appraiser he (Mr. S.) thought it "all wrong";—

"you have not examined or opened a single leaf of this tobacco, and there is any quantity of it that is not suitable for wrappers, either in size or texture." The appraiser's reply was;—"We cannot go into that; it is all wrappers; it is one hundred per cent wrappers, in our judgment. *We don't examine any leaves here. Your manufacturers do that.*" (Rec. 19, 20.)

Other witnesses corroborated the testimony as to less than the statutory percentage of sample bales being "suitable for wrappers." *(Id.* 20, 21.*)*

Treasury Department decision of August 1, 1887 was introduced; the pertinent part of which (utterly ignored in the examination of the few bales of our tobacco sent to the public store) that THE LEAF was the statutory unit for the determination of weight and fineness, reads;—

"EVERY LEAF, eightyfive per cent *of which* is suitable for wrappers, and the weight *of which* is such that more than one hundred SUCH leaves *would be* required to weigh a pound, is declared to be liable to the high rate of duty. This view is further strengthened by the provision in the paragraph that, in determining the weight, *the individual leaves alone are to be regarded.* The weight is *not to be determined by hands*, or packages, or bales, but by *leaves.*" . . . . .

"It has been suggested that it would be difficult, if not impracticable, for *the appraiser to adopt the leaf* as a unit; but it is not believed that such an objection rests upon tenable grounds." (Rec. 22, fols. 51, 52.)

This decision was declared to be final, not itself subject to modification, while modifying all earlier instructions so far as inconsistent therewith. *(Id.* 23 bottom,*)*

The Custom-House liquidator explained the method of liquidating the duty, from the appraiser's return, which stated what fractions of designated bales are dutiable at 75, and what at 35, cents a pound. The weigher's return is attached to the entry, giving the weight of each *bale* imported. The liquidator applied

the appraiser's percentage to the weigher's weight of each bale.

There was nothing to indicate the several weights of the two classes in one bale; nor to show the weight of the hands found by the appraiser to be *of different classes.* (Rec. 25, 26.)

It was proved that not all of the thirty public-store bales were weighed, or had *any* hands drawn from them, in the examination of them. The examiner weighed and drew out hands from that undefined number of these bales which *he* "deemed necessary." *(Id.* 26.*)*

The Court directed a verdict for the plaintiffs for the amount of the difference between the higher rate of duty applied to part of the ten bales in suit and what the lower rate upon the whole of them would have been; $708.12. (Rec. 29, end of fol. 67.)

Specific corrections of the government 'Statement.'

The first important error is in the third and fourth lines of the Attorney-General's "Statement of Facts," to wit; "Of these, 30 bales were examined Nov. 5, 1888."

That number was sent to the public store "*to be* opened *and* examined"; but the examiner testified he did *not* examine them all; but only that indefinite number as to which doubt arose in his mind as he glanced at them. (Rec. 26.)

Hence, it is an assumption unsupported by any evidence to say (bottom of page 4, Attorney-General's brief) that No. 1524 "was *actually* examined at the public stores." It went there; but *non constat* that the high rate was not placed upon it at a glance; without that drawing and weighing of leaves which the law and the explicit instructions of the Department required.

While the language quoted (top of page 5) that "one bale coming from a plantation is *as near a representation* of all the bales coming from that plantation *as you can represent a large lot of tobacco by* SUCH *a sample*" was used, the obvious inference now sought to be drawn from it was expressly denied; for it was immediately followed by the statement that there were not any two bales alike. (Rec. 26.)

Certainly, it was not intended to imply that ten 'hands' from one bale would represent all the bales from that plantation within $\frac{1}{100}$ as to size, fineness and weight of all the leaves contained therein; they might 'correspond', though somewhat different; but it does obviously imply that an examination of a number of bales would be more accurate than "such a sample."

Really, this quoted sentence paraphrases Abraham Lincoln's endorsement of Artemus Ward's book;—"For those who like this kind of a book, it is just the kind of a book such people would like."

It is erroneous to say (page 5, § 2) that "The tobacco leaves are imported in *packages* called hands." A 'hand' is *not* a 'package' as is fully shown *post*, in the argumentative part of this brief. (*Post*, pp. 23, 30, 31.)

The witness did not say that the hands had a uniform number of leaves;—but only that the number was not varied by reason of any difference in the *weight* of the leaves of which they were composed. (Rec. 19.)

Those drawn by the examiner varied in weight and count "in almost every instance". (Rec. 16.)

The "hand" varies, from less than twenty to more than fifty leaves; usually 35 to 40 leaves. (55 F. R. 385.)

The Attorney-General (p. 5, lines 9 and 10) appears to confound "samples"—in which were several hands—with 'hands'.

There is this statement, upon the same page, which is emphatically *true;* and it states the fundamental error of fact which was at the foundation of the whole of the government's so-called 'examination';—"He [the

examiner] *assumed the leaves in each hand to be of uniform weight*";—while the contrary is the truth. As to this subject, see *post*, p. 34.

It is a misconception (p. 6) that Mr. Shroeder objected to the opening of so many bales; nor did *he* say that the drawing of hands injured the bale. He objected only to opening so many bales *at once*, and leaving the hands exposed, to dry, too long. (Rec. 20.)

The government's own witness testified, without contradiction;—

"If a bale of tobacco is *properly* opened, and the hands drawn out, and then the bale is closed, the bale would not be much injured; the hands themselves which were drawn out, *might* be, *by opening when they were dry*, but *the bale itself would not be materially injured*."

He added that whether the drawn hands were injured or not would depend upon their handling; adding

"if the whole bale was taken apart, and every hand examined, it would be a decided injury to the tobabco, UNLESS *done with great care*, in a *proper* room, with proper moisture," etc. (Rec. 28 bot.)

This is what it all amounts to:—with proper precautions, a whole bale *can* be examined without injury; but the customs-officers preferred to violate the law, disobey treasury instructions, neglect their duty, and disregard their oaths, rather than take so much trouble!

Near the top of page 7 of the Attorney-General's brief, where three stars indicate an omission, the collocation of separate sentences of Mr. Scoville's testimony is susceptible of the construction that it was the opening of the whole bale that he said would have to be done with extraordinary care and great expense; whereas it was a leaf-by-leaf examination which he said involved such care and expense, to avoid injury to the tobacco (Rec. 28 bottom.) Yet it was a leaf examination the examiners were required by the Department to make *(Id.* 22*)*—and did *not*, though told by Mr. Schroeder that they should. *(Id.* 20 top.*)*

Upon page 11 of the Attorney-General's brief, the quotation of Secy. Fairchild's requirement *(never rescinded)* "at *least* one bale in ten of every invoice to be *thoroughly* examined by the appraiser" etc., etc *(qu. vid.* Record, 25, fol. 58*)* is followed by the statement; repeated several times in different forms through the brief, that "This thorough method of investigation was objected to *by the importers*," etc., etc.

There is absolutely no foundation in this record *for this statement;* nor, so far as we can find, *dehors* it.

The *appraiser* sought to relieve himself of an irksome task, by certain representations, so that he might be allowed to draw ten hands "*or more*" from *every public-store bale,* instead of any more "thorough examination"; but the *number* of bales which should be "representative" was not diminished. (Rec. 24–25.)

Mr. Fairchild speaks of the tithings as "*such* representative bales" (Rec. 25, fol. 58); and Mr. Maynard obviously intends the same as "representative." *(Id.,* 24, fol. 56.)

If *any* "importer" ever asked that less be done, there is no evidence to show it; nor, if some John Smith or other, down in New Orleans or elsewhere, ever did ask it, as to *his* tobacco, that could not prejudice Schroeder & Bon's right to have the law complied with; especially, when their very specific complaint was that the examination was "all wrong", because insufficient to develop the actual condition of things. (Rec. 19 bottom and 20 top.)

Therefore, we repeat, that the statement (Atty. G.'s Br. p. 13) that "The change subsequently made by which the ten hands drawn were assumed to represent the whole bale was at the request of the importers," etc., finds absolutely no support in the evidence.

But this statement would be more material than it is in the present case, if the examiner had drawn the prescribed ten hands from "*each* representative bale" (Rec. 24, fol. 56); but he did not. *(Id.* 26, fol. 61.)

The statement (upon the same brief, page 13) that

" The method prescribed by Mr. Fairchild was . . . such as to insure absolutely correct results," is neutralized by the parenthetical qualification, " assuming the leaves to be of uniform weight in each hand";—a thing that almost never happens as to any two hands. (Rec. 16, fol. 39; 17, fol. 40; and *passim.* Also, *post*, pp. 34 *et seq.*).

As to the starred and italicized quotation (upon pp. 13 and 14 of govt. br.), it omits to indicate that, in Falk's case, it was " Havana fillers " that was bound up with the Sumatra;—and it is inapplicable, because there was no pretext, in the cause at bar, that ours were aught but the ordinary commercial bales of Sumatra tobacco. (Rec. 17, middle.)

There were no " mixed lots " (Gov. br. 15), but these bales were made up just as the leaves were gathered and packed (in the usual way) upon the Sumatra plantation *(Ibid).* (See *post*, page, 45, § V.)

POINTS.

I.

Grounds of our suit.

Our claim is that leaf-tobacco, generally and *per se*, is dutiable at thirty-five cents a pound; and only that small fraction of the whole mass imported into this country which—upon proper and legal examination directed toward the determination of the fact—is found to possess those special qualities of lightness, fineness and suitability mentioned in the statute is to pay any higher rate.

We invoiced and claimed to enter our tobacco at 35 cents a pound; but were compelled to enter it at, and

pay, seventy-five cents a pound ; which we only did, under protest, and to obtain possession of our goods.

We impeach the so-called 'examination' whereby the higher rate was affixed to our importation upon three distinct, general grounds :—

First, the utter disregard by the collector of New-York of the express statutory mandate (R. S., sec. 2939) requiring that he should not 'under *any* circumstances' send less than one package out of every ten in an invoice to the public store for examination ; R. S., Sec. 2901 repeating same command to *every* collector ; whereas *he* only designated *five* out of 429 packages ; disregarding, in so doing, an express treasury regulation as to this article. (Rec. 25, fol. 58.)

Second, the clause making special qualities the dutiable test required the sending of *every* package to the public store, to be examined as to the presence or absence of those qualities.

Third, The failure properly to examine (either as required by law or by the regulations then prescribed by the Treasury Department) the few bales that went to the public store out of our considerable importation.

At the commencement of his Argument (His. Br. p. 16) the Attorney-General errs in assuming our objection to be "absolutely technical"—though such an objection might suffice to defeat an excessive taxation ; as well as in his assumption of the whole question—*petitio principii*—that we thereby sought to be relieved "from paying the *proper* duties on the goods." On the contrary, upon the entry, we claimed thirty five cents a pound to be "the proper duties on the goods." (Rec. 15, fol. 36.) If the collector would justify himself for exacting the higher duty, he should have established its propriety by a 'proper' examination, according to law. It is not technically, but actually, that we were

injured by an arbitrary exaction, with no real examination of our goods to warrant it.

II.

Sec. 2939. Number sent for examination.

It may be profitable to inquire into the origin of the U. S. customs-appraiser's office, and the relation its prescribed functions bore to the invoices of imported goods; and how the scope of its duties has been enlarged.

During the first thirty years of our tariff legislation, no such officer was known to our laws.

The act of July 31, 1789, c. 5, § 13, required every person having goods arrive to enter them, "specifying *the number of packages*, and the marks, numbers and contents of *each* . . . together with an account of the *nett prime cost* thereof; and shall moreover produce to the collector the original invoice or invoices, together with the bills of loading; and the collector shall estimate and endorse the duties on the said entry," etc. (1 Stats. 40 top.)

Only in the case of damaged, or of uninvoiced, or suspected goods was there any appraisement; and, in these instances, by two selected merchants *(Id.* 41, § 16*)*; by act of 1818, §§ 2, 9 and 11, by government appraisers. *(Id.*, 434–6.*)*

All other importations paying *ad valorem* rates had these assessed upon ten or twenty per centum added "to the *actual cost* thereof," accordingly as they came from one side or the other of the Cape of Good Hope. *(Ibid.* § 17.*)*

From that date to March 1, 1823, 'net,' 'prime,' or 'actual' *cost* was the primary element to determine the

duty to be paid; and that cost was taken from the invoice.

Alfonso vs. U. S. 2 Story, 422.
Act Aug. 4, 1790, § 39. *(Id.* 167.*)*
Act Jan. 29, 1795, § 3. *(Id.* 411.*)*
Act March 2, 1799, § 61. *(Id.* 673.*)*
Act Apr. 27, 1816, § 1. (3 Stats. 311.*)*
Act March 3, 1817, *(Id.* 369.*)*
Act April 20, 1818, § 4. *(Id.* 434.*)*
Act March 1, 1823, § 5. *(Id.* 732–3.*)*

This last-cited section, to make dutiable amount, added the above-mentioned percentages and charges "to the actual cost", if purchased; to the actual value, if otherwise procured; "or to the appraised value, if appraised." *(Ib.* 732.*)*

The last-named contingency only occurred where, for any reason, no invoice accompanied the entry, or suspicion attached to the document produced. (Same act, §§ 13 and 14; *Id.* 734–5.)

Such was the provision in earlier acts, commencing with that of March 2, 1799; which provided for the selection of merchant appraisers to determine damage allowances, or the value of the importation in the damaged condition in which it came, and that of uninvoiced goods (sec. 52; 1 Stats. 666); and of those where fraud or undervaluation was suspected *(Id.* p. 677, §§ 66, 67*)*; the proceedings being "as in the case of damaged goods." *(Ibid.)*

Evidently, in those days of few and small importations, the collector accepted the invoices, unless the inspectors, weighers, gaugers, or somebody or something attracted his attention to circumstances which led him to suspect fraud. If there was no invoice, or the goods had suffered a loss of "actual" value *in transitu* or the invoice was suspected, he (in the presence, or with the aid, of merchant or other appraisers) examined *all* the goods constituting the importation. If there were no invoice, this had to be done to see what the goods were, and what they were worth; if injured, to

determine the extent; if fraud were apprehended, to verify or to dispel the suspicion.

In his speech of May 9, 1828, upon the tariff bill which became the act of May 19th of that year (4 Stats. 270) Mr. Webster noticed that *ad valorem* duties, "from the commencement of the government, have been estimated by reference to the invoice," etc. "When not suspected to be false or fraudulent, the *invoice* is the regular proof of value." 3 Webst. W'ks. 233.

Accordingly, *only those goods uninvoiced or suspected to be undervalued* were to be appraised; all others were dutied upon the invoice value. (See sec. 13 Act of 1823;—3 Stats. 734–5.)

This was true of appraisements under the act of 1818, as above noted; the court construing it that the collector should only direct an appraisal where he personally suspected fraud; and not upon the suspicion of other officials or persons. Tappan v. U. S. 2 Mason, 401, bottom; 403 and 405.)

To see if there were any suspicious circumstances, the collector was "required to cause one package out of every invoice, and one package at least out of every fifty packages" to be opened and examined—*not* to ascertain value, except as compared with the invoice—"and if the same be found not to correspond with the invoice thereof, or to be falsely charged in such invoice, *a full inspection* of *all* such goods, wares or merchandise as may be included in the same entry, *shall* be made." (3 Stats. 438, § 22.")

The fifteenth section of the act of 1823, substituted "twenty" packages for 'fifty,' and otherwise reproduced the phraseology of its predecessor, above quoted. (3 Stats. 735.)

The eighth section of the act of May 19, 1828, was the first to require the appraisement of all goods dutiable *ad valorem*. (4 Stats. 273–4.)

The tenth and concluding section (afterward R. S. Sec. 252) of that act makes it the duty of the Secretary,

under the direction of the President, to establish rules and regulations, not inconsistent with law, to secure a just, faithful and impartial appraisal. *(Id.* 274.*)*

The requirement of sec. 4, Act of May 28, 1830, is the same as that in the eighth section of its predecessor. (4 Stats. 410.) So is § 7 of the act of July 14, 1832. (4 Stats. 591-2.)

The act of August 30, 1842, § 16 (5 Stats. 563-4) made the same provision as to appraisements; but its twenty-first section *(Ib.* 565*)* required the collector to designate, to be opened and examined "one package at least of every *ten*," instead of the number prescribed by earlier legislation; and that requirement has so stood upon our statute-books ever since; coming into the Revised Statutes, as Section 2901.

Notwithstanding this general command to all collectors had been twenty-four years in force, on the 27th of July, 1866 (14 Stats. 302) a proviso was added, *ex magna cautela*, to the first section of the act of that date which is now Rev. Stats. Sec. 2939, printed *ante*, page 2; that under no circumstances shall the collector at New-York, designate less than one package in ten, etc.

That section (§ 1, Act July 27, 1866) authorized the appointment of a principal appraiser at New-York, who was to be sworn to "supervise the *examination, inspection*, and appraisement *according to law* of such goods, wares and merchandise *as the collector may direct*" (14 Stats. 302); then is added the proviso that the latter shall not, 'under *any* circumstances' direct the sending for examination of less than one package in ten. *(Ibid.;* R. S. sec. 2939.*)*

Can any language, or oath of office, more imperatively require the *examination and inspection* of at least one package in ten of every invoice.

Revised Statutes, section 2899 provides that no merchandise liable to be *inspected or* appraised shall leave the custody of the customs officers until it has been inspected or appraised, etc.

Then section 2901 prescribes the least number that, in the first instance, is to be sent to the public store; to be there opened *and* examined, whatever may be the character of the merchandise; and appraised, if an *ad valorem* duty attaches to it.

The history of this proviso confirms our statement of the watchful care that induced its insertion.

When the bill was introduced in the Senate, this clause was not found in it. It was added, after the word 'direct,' in the Commerce committee-room. There was no opposition to it in Congress; but there was to the second proviso, permitting the Secretary to authorize, under certain circumstances, the examination of a smaller number. This was overcome by Senator Chandler's explanation;—that if a cargo of railroad iron, or of lemons or oranges arrived, every rail and every box of lemons would be a "package," so that one-tenth of such cargoes, though the different units were identical in appearance and character, would have to go to the public store. He added that this second proviso was only intended to apply to such exceptional cases. Ordinarily, at least a tithe would be examined; and more, whenever the character of the importation required.

The object of the foregoing resumé of the statutes is to show that the examination of *any* packages; of a fiftieth, a twentieth, a tenth, or any fraction of an entire importation; is, primarily, to ascertain if the invoice gives its true character and appropriate dutiable classification. If not, then *all* the packages should be subjected to examination, to determine the rate of duty applicable to each. Every package must either be dutied according to the invoice, or according to an examination of it. No one item should be raised as the result of another item's examination;—especially where individual characteristics are the statutory ground of laying the duty, and are likely to differ in different packages.

The Regulations issued by the Secretary of the Treasury, under the direction and with the approval of the President, "to secure a just, *faithful* and impartial appraisal" (R. S., secs. 249, 252 and 2652) prescribe that construction of the statute which we have just given.

For instance, the Treasury Regulations of 1874;—

Art. 409. A thorough examination must then be made, under the direction of the appraisers, *in connection with the specifications and descriptions in the invoice, to ascertain whether the merchandise corresponds* in quantity and *description* with the invoice," etc.

"Art. 410. If it is found, on such examination, that the merchandise in the package varies in quantity or *in character* from the specifications in the invoice, it . . is the duty of the appraisers to notify the collector, in writing, of the facts and, if necessary, request that the remaining packages contained in the invoice be submitted for their examination *in detail*."

Arts. 451 and 452, Regulations of 1884—in force when this tobacco was imported—reproduce the foregoing, literally.

See, also, Art. 448.

That the result of a failure to make examination of the requisite number of packages is to leave the goods dutiable only at the lower rate, applicable to leaf tobacco generally, see Burgess v. Converse, 2 Curt. 216, 221-2; 18 How. 415-6.

Ystalfera v. Redfield, 21 Blatc. 311;
23 F. R. 650. Affirmed, 110 U. S. 177.
U. S. v. Chase, 25 Int. Rev. Rec. 162.

The Treasury Department acquiesced, without appeal, in a similar determination (per SHIPMAN, J.) of the Fleischmann glass case, a few years ago, in the same Circuit Court.

If the customs-officers do not make *such an examination as the law requires*, their action (if protested against, etc.) is a nullity.

Greeley v. Burgess, 18 How. 415, 416.
Oelbermann v. Merritt, 123 U. S. 356.

Badger v. Cusimano, 130 *Id.* 43.
Robertson v. Frank, 132 *Id.* 17.

Receiving the Attorney-General's brief while our own is in *fieri*, we observe he says (p. 17, line 4) that Mr. Schroeder "admits that he made no objection because more bales were not opened, but complained, on the contrary, because the examiner opened *as many* as he did." Reference to the cited page and that preceding (19 and 20) of the record will correct this misapprehension. Mr. Shroeder told them their examination was "*all* wrong" (p. 19 bottom); that they had not examined a single leaf, though many were not "suitable for wrappers" *(Ibid.)*; and his complaint was against opening too many "at one time," and keeping them open too long. *(Id.* 20.*)*

As matter of fact, it was useless to send *any* bale there which was not "to be examined", as the law and regulations prescribed, after it got there!

Then the Attorney-General (Brief 17) quotes from French v. Edwards, 13 Wall. 511; a case altogether in our favor, as a tax sale was there held invalid, because the Sheriff did not follow the course prescribed by the statute.

The above-cited cases show that we were to be protected by *a certain method* of examination, before our property could be assessed with a ruinous revenue-tax.

One sentence of this quotation we will reproduce in close juxtaposition to the language of the section we are considering.

"Provisions of this character are not usually regarded as mandatory, UNLESS accompanied by *negative* words, importing that the acts required shall not be done in any other manner or time than that designated." (13 Wall. 511.)

"Sec. 2939. The Collector of the port of New York shall NOT, *under* ANY *circumstances*, direct to be sent for examination and appraisement less than one package of every invoice, and *at least* one package out of every ten packages," etc., etc.

The *Secretary's* discretion was exercised by requiring one bale of tobacco out of every ten to be sent for examination, as this section provides. (Rec. 25, fol. 58.) Instead of dispensing with this provision, he demanded obedience to it.

The Attorney-General argues (Brief, pp. 18-22) that Secs. 2901 and 2939, requiring one bale in ten to be sent to the public store for examination, were only enacted for the benefit and protection of the United States;—hence, that the importer can have no ground of complaint if their provisions are not observed.

This position is met by what we have already said; but we will reply specifically.

Though his assumption be gratuitous and unfounded, (2 Curt. 221; Cooley on Taxn. 265), we might concede it, and yet confidently and successfully deny the conclusion thus drawn from it.

Duties do not arise spontaneously. They attach themselves to property only by force of legislation; so that an article not provided for in any way by statute, is exempt. Liverpool Hero, 2 Gall. [188.] A tariff affixes a certain rate to a specified article. The collector, or other customs officer, cannot of his own mere volition, without any examination or actual knowledge, declare it to be a different article, and subject to another rate. (Howland v. Maxwell, 3 Blat. 146; Carnes v. Same, *Id.*) He must proceed according to law to accomplish this result. An importer presents and swears to his invoice and entry of cow-hair goods; or of cotton; or of leaf tobacco, which he says is of a character not defined in the paragraph we are considering; if the collector accepts them, and demands no other rate than that the importer signifies, then it is true the latter cannot complain if *no* case is sent to the public store. But the collector cannot arbitrarily declare the cow-hair to be wool; the cotton to be silk; the tobacco to possess a definite proportion of lightness, fineness, and size, and exact the higher duties accordingly, without any examination; or without *such* an exami-

nation as the law demands. If the statute is not followed, it does not protect.

But for these sections, he would *have* to scrutinize *every* bale or package imported, or accept the invoice. They do benefit the United States, and its officers, by substituting a tithe for the whole. They also benefit and protect the United States by providing a method for ascertaining and levying a larger duty than that declared upon the entry; but the United States cannot secure this protection and obtain this advantage and impose a heavier pecuniary liability upon a protesting merchant, except by following the method prescribed. She cannot reap the benefit, ignoring the means.

Damascene rivers may be better, but Jordan alone can cleanse.

Upon page 21 of his brief, the Attorney-General, with the force of italics, says the Secretary had, by Special Regulation, directed a less number of *packages* to be examined"; refering to Syn. Dec. 8368, found at pages 21 to 23 of the record.

Referring to that same circular, we deny that such is its effect. It *only* relates to the drawing of hands, instead of tearing the bale all to pieces. It does *not* rescind Sec'y. Fairchild's instruction, to comply with the law, by sending one out of every ten. If the importation consisted of but ten or less bales, the appraiser could examine one or more of them, as he deemed necessary. This the law permitted. But it nowhere permits "THE COLLECTOR AT THE PORT OF NEW YORK" to send less than one in ten packages to the public store.

Section 2939 is personally addressed to "the *collector* of the port of New York." Its concluding sentence allows the Secretary—not by any *General* Regulation, nor by a letter addressed to the collector of El Paso, Texas (Rec. 23, bottom)—by *Special* regulation, addressed to that one New York functionary for his guidance there, to direct a less number to be examined.

This letter to the El Paso collector, in reply to one

addressed to the Secretary, regarding Mr. B. Weyl's importation of tobacco from Mexico (Rec. 21) was *not* the "Special Regulation" contemplated by Section 2939.

Near the close of this division of his brief (p. 22) the Attorney-General recognizes that the purport of this letter was to allow the drawing of ten hands from whatever bales were examined, instead of their being "completely taken to pieces."

It will be seen that we contend here (below, Div. III), as we did in Soby's case (Atty.-G.'s Br. 22), that Secs. 2901 and 2939 do not apply; but, then and now, that if it does not, *every* bale must be examined. Sec. 2901 alone was in Soby's case; as the duty was paid in Hartford.

A rate of duty is prescribed by law for such goods as ours appeared to be upon the invoice, and without any examination. No higher rate could be imposed, except as the result of such proceedings as the law prescribes for this purpose; and these were *not* had—neither under Syn. Dec. 8318, nor otherwise.

III.

Every package should be examined.

Reference to the cited statutes *(ante,* pp. 14–18*)* proves —what the very name of the office implies—that an *appraiser's* duty is restricted to the ascertainment of the *value* of those importations dutiable at *ad valorem* rates.

Rankin v. Hoyt, 4 How. 327.

When these officers inquire into condition or quality, it is only to see how these affect that *value* which is the basis of duty.

Kimball v. Collr. 10 Wall. 436.

The Justice who wrote this opinion observed at circuit, that the appraisers ascertain value; "but they have *no authority* to determine the weight or quantity of the importation." U. S. v. Nash, 4 Cliff. 107, 112.

They have just as little to do with *quality*, where the duty is not *ad valorem*.

Mr. Justice CLIFFORD merely followed the decision of this Court, announced by its Chief-Justice, as to the ascertainment of the *weight* of an importation, to compute the duty thereon;—

"The latter is fixed by another class of officers, authorized by law for that purpose; and *if the appraisers undertake to fix it, their action in that respect is coram non judice and a nullity.*"

Marriott v. Brune, 9 How. *634.

The appraisers' "powers do not authorize them to extend their inquiries beyond what is necessary to enable them to appraise the *value* of the merchandise, *according to law*. U. S. v. Nash, 4 Cliff. 112.

The case of Marriott v. Brune suggests another proposition affecting the insufficiency of the so-called examination of our tobacco.

Ad valorem duties are based upon a foreign valuation; but all specific duties are laid upon the thing—and the quantity or measure of that thing—imported. The act of 1883 lays its duties "upon all *articles imported*," etc. (22 Stats. 491, § 2502); and its free list declares "The following articles, *when imported*, shall be exempt," etc. *(Ib.* 514.*)* If eggs are shipped, and chickens hatched from them are unladen the duty is upon the "live animals."

There were 77,185 pounds of tobacco invoiced to us,

but (owing to evaporation, probably) the actual weight here was 76,701 pounds. (Rec. 9, fol. 23.)

"As to imports, they therefore, can cover nothing which is not *actually* brought into our limits. . . . When the duty was specific on this article, being a certain rate per pound . . it could, of course, extend to no larger number of pounds than was actually entered. . . . The collection of a revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of congress, nor required to enforce just rights. It is the quantity actually received here by which alone the importer is benefitted," etc., etc.

Marriott v. Brune, 9 How. 632–3.
Lawrence v. Caswell, 13 *Id.* 496.
Schuchardt v. Lawrence, 3 Blat. 397.

In another case, in the same circuit, it was held that the importer could show that he had been imposed upon by his vendor, and correct his entry accordingly, so as to pay duty only upon the article and *grade* which arrived.

" Certainly, if the invoice was of 'pure, white lead' and, by error or fraud, the article entered was 'whiting' of half the value, it would hardly be contended that the proviso referred to [as to invoice-value] should conclude the importer. I can see no difference in the cases, for *the grades are a necessary part of the description* of the article invoiced."

Lillie v. Redfield, 4 Blat. 42, 43.

In this act of 1883 (22 Stats. 503 top) Congress has created distinctions and grades, for dutying purposes, as applicable to leaf-tobacco, or 'tobacco in leaf'; using these terms synonymously.

First, leaf-tobacco of which a fixed percentage possesses a size, a fineness of texture and a lightness adapting it to a specific purpose, when not stemmed; *second*, the same grade or class of tobacco, in the leaf, stemmed; *third*, all other leaf-tobacco, unmanufactured and unstemmed; *fourth*, manufactured tobacco, of all

descriptions; and, *fifth*, tobacco (unmanufactured) which has had the stems removed.

Upon these grades, or conditions, of tobacco, still in the leaf, rates applicable to each, varying from thirty-five cents to a dollar, are imposed.

It is certain that an examination must be made of an importation of leaf-tobacco, to determine into which class it falls; and *the examination must be such as the statutory terms require.* A glance may tell whether tobacco is stemmed or unstemmed; more care, ascertain the size of leaf; scrutiny, to ascertain the fineness of texture; and the actual test by the scales, to know if more or less than one hundred leaves are required to weigh a pound.

The duty accrues, and becomes the personal debt of the importer, the moment the ship carrying the goods arrives at her port of entry, and the right is complete, "without entry."

Arnold, 1 Gall. 354; 9 Cr. 119.
U. S. v. Vowell, 5 Cr. *368.
Meredith v. U. S. 13 Pet. 494.
U. S. v. Lindsey, 1 Gall. 365.
The Boston, *Ibid.* 239.
Prince v. U. S. 2 *Id.* 208–9.
U. S. v. Lyman, 1 Mas. 482.
Perots v. U. S. Pet. C. C. 257.
U. S. v. Dodge, Deady, 126.

The duty is *a tax upon the thing* imported; not a license-fee upon the act of importation; and the vessel's arrival fixes the moment when the prescribed tax fastens itself to *the thing described* in the statute.

Brown v. Md. 12 Wh. 437–8.

The prescribed rate of duty attaches itself to the article imported, *when* it is imported, *as* it is imported; to the *res*, in the condition in which it *then* is; nor can any *subsequent* manipulation, by importer or customs official, change or affect this rate.

The statutory examination is merely to ascertain what duty legally attached to the thing arriving, upon

its arrival; and the proper amount, ascertained conformably to law, is the measure of the personal debt accruing to the government, from the importer, at the moment of the ship's arrival.

As American barrels exported empty and brought backed filled are not imported "in the same condition" (24 How. 529) so a cargo, an invoice, a "plantation-lot," a bale, or any mentionable bulk or parcel of tobacco, containing leaves indiscriminately mixed, as they were gathered and packed upon the distant plantation, for an unknown destiny, is *not* the same thing in fact, in commerce, or in law, when it is physically and actually separated into two masses, lots, bales or packages, of which every leaf in one answers the statutory description, while every leaf in the other fails to respond to it;—and it is in the undivided quantities (whatever these may be) in which it arrived that it is to be dutied.

As not merely the nomenclature, but the general language, of the law is to be taken in its commercial sense (8 Pet. 279; 10 *Id.* 151; 2 Paine, 59) the importer has a right to assume that "articles imported" in the ordinary course of business, and in the form in which it is usually dealt in, commercially, will be subjected to duty accordingly.

As to articles *not* so imported, and purposely put into a different form (as in Falk's case) he has no ground for indulging any such expectation. If what he imports is not, as he imports it, an article known to commerce, but consists of two articles, visibly divided *because* they are, and are intended, to float separately, and not together, along the tide of our commerce, they should be separated in law because they are so in fact. It was explicitly upon this ground that the decision of Falk's case was placed, both in the circuit and in the appellate court. (25 F. R. 897-8; 137 U. S. 232.)

Judge WHEELER reconsidered his first determination, *because* an inferior quality (Havana leaf tobacco of a low grade) was put in with the Sumatra "with strips

of paper or cloth to mark the extent of each, which were separated again after importation." (25 F. R. 898.)

"The quality and standard of the superior grade were not changed by binding the inferior grade, *in a separable manner*, with it into a bale. A *distinct* quantity of the superior quality, subject to the higher rate was imported *with* each of the bales. *It was the same where it came from, and all the way, and after its arrival.*" *(Ibid.)*

He adds that, though the act does not refer to any particular quantity, as a basis for the 85%, "it appears to be intended to apply to any *distinct* quantity of the requisite qualities which should be imported;" evidently, referring to its severance *when imported*, or as an import. *(Ibid.)* "Here, the article was *sought to be reduced by association* with ANOTHER ARTICLE during importation, *and to be restored* afterwards." *Such* "association did not reduce nor affect it." *(Ibid.)*

The Supreme Court affirmed Judge WHEELER'S final judgment, upon the reasoning on which he based it. (137 U. S., 225.)

"In the present case, the carefully *separated and distinguishable quantity* of tobacco in the bale which was of the specified size, fineness and weight, was the whole of it, that is, 100 per cent., and more than 85 per cent., of that size, fineness *and weight;* and all of it fell under the description of what was dutiable at 75 cents a pound. The unit is not the bale, but is the *separated* [when imported] quantity of such leaf tobacco. *That* quantity stands, for the purpose of duty, as if it had been *imported* in a bale which contained nothing but itself. By *the method of packing*, the wrapper tobacco and the filler tobacco remained *entirely distinct*. The *association* of them in the bale was, evidently, only for the purpose of avoiding the higher duty imposed upon the superior tobacco. *This association was to be dissolved* the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market. It appears from the testimony of one of the plaintiffs that, prior to the act of 1883, the bale of Sumatra tobacco

that was known and dealt in was a bale containing about 160 or 170 pounds of that tobacco, and inferior tobacco was not imported in the same bale with such Sumatra tobacco."

Falk vs. Robertson, 137 U. S. 232.

Commenting upon the importer's reference to the methods of examining sugar, and to the statutes relating to different articles included in one package, the Opinion adds:

"But we do not perceive that these statutory provisions affect the question in hand. They refer only to what is to be done *as to appraisement* when two articles of different quality are imported in the same package, and to the separate entry of a package packed in a larger package; but there is nothing in these provisions which shows that the 85 per cent. in question is to be regarded as meaning 85 per cent. of the entire contents of a *package containing separable and* SEPARATED *quantities* of leaf tobacco of two different qualities, and subject to two different duties." *(Id.* 233.)

In a later decision, Judge WHEELER recognized that the Supreme Court accepted his reasoning, as well as his conclusion; saying, of Falk's case, there "was packed into a bale *a separate mass* of tobacco," etc.; "distinguishable by itself," etc.

Blumlein, 49 Fed. R. 228.

"I so decided, and the Supreme Court said I was right; *not* because there was to be found in there leaves of the requisite lightness, but *because* IN SOME DISTINGUISHABLE MASS [when imported] there was tobacco of the requisite lightness." (Blumlein, *Id.*, 233.)

It was the *distinguishment* between one mass possessing the requisite lightness and other peculiar qualities and the other in which they were absent—the two growths of tobacco being actually and commercially different articles—that required each to be separately dutied, as they were thus separately distinguished, and separately dealt in, in the Falk case.

The decision in the Blumlein case was affirmed by the United States Circuit Court of Appeals; at the same time that a similar decision by Judge SHIPMAN, on the Connecticut circuit, was also affirmed.

In re Blumlein, 55 Fed. R. 383.
Hubbard v. Soby, *Ibid.* 388.

Each of these causes was reasoned out independently by the judge presiding at the trial.

The distinction between the claim of Falk & Co. in their case, on the one hand, and that of the Government in Blumlein's, Hubbard vs. Soby, and the cause at bar, upon the other, is that Falk asked to have two separated masses treated as one; while the United States asks to have one indivisible mass, which never has been—and, practically in trade, as an article of commerce, never *can* be—separated in *fact*, treated as if it were imported separately, or was afterward actually separated, or separable.

The Government's whole claim in this case is based entirely upon the theory that the Court should assume that to be true which all the evidence in the case shows to be false;—viz., the assumption that there was, at some time, a separation into parts of the tobacco we imported, other than that made by putting it originally into such bales as are its ordinary commercial package.

For the reasons so cogently stated by the U. S. Cir. Court of Ap. in Blumlein's case (55 F. R. 386) which might be elaborated (but not greatly fortified, perhaps) by discussion and citation, we feel sure *the bale*—when it is the ordinary bale of commerce, and not an individual exception thereto—is the true unit upon which the computation of percentage is to be based and to which it is to be applied, for dutying purposes; but the court will observe that the sustentation of the judgment in our favor does not depend upon the maintenance of this proposition; though, if it be maintained, the judgment must be affirmed.

To speak more accurately, *the commercial package*—

that in which the commodity is customarily bought, sold, weighed, dealt in, and imported—is the true unit; which, in this article, happens to be the bale.

As to molasses, it is the hogshead or barrel; "For all the purposes of appraisement, with a view to ascertain the dutiable value [or any other dutiable quality] of the importation, the barrels, if filled, are regarded with their contents as *packages;* and it is the duty of the collector, by the express words of the statute, to order one in ten of the packages to the public store."

Knight v. Schell, 24 How. 530.
Wyld v. Pickford, 8 M. & W. 462.

Of sugar, the 'package' may be a hogshead, barrel, box, 'mat,' or bag; of lemons, the box; of coffee, the bag: of tea, the chest; etc., etc.; but whatever the form of the customary commercial package, that is the unit of dealing with it in the custom-house, as it is in trade.

1 Hughes, 530.

"All laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense.

U. S. v. 112 Casks, 8 Pet. 279.

The defendants in error bought, and their vendor sold them, 479 bales; so invoiced; so designated for examination thereon; so weighed; so examined for duty—but by applying vulgar fractions to the integer. Then this was the unit, "one and indivisible"; which was never divided in fact, though its *imaginary* division was made the basis of the duty against which we protest.

The Century Dictionary defines "Package" as "a quantity pressed or packed together; (2) *A unit of freight.*" Goods put up in a "form for handling, transportation or sale."

U. S. v. Goldbach, 1 Hughes, 530.
Boskowitz v. Adams, 93 Ills. 529.

Whatever the separated and distinguishable mass to be dutied may be, it is obviously *some unit* that is (or may be) *composed of recognizable fractions*, which are to be ascertained and recognized AS FRACTIONS of the dutied integer—and not as themselves constituting an independent dutiable unit. (Blumlein, 55 F. R. 385, bottom, and 386, top.)

True, the bale, or mass, is a discrete quantity; capable of being returned into its individual elements, or leaves;—but this only emphasizes the fact that it is to be so analyzed, in order to discover its fractions, and to ascertain what proportion of it possesses those peculiar characteristics which double the duty, and what part does not possess them.

It is not merely an agricultural (or mercantile) fact, but one in recognition of which the statute is framed, that some leaves of tobacco (packed or unpacked) possess a higher degree of those peculiar properties of lightness, fineness and size adapting them for use as wrappers than do other leaves of the plant; it is also incontrovertible that (whatever may have been hastily supposed, formerly) there is great difference, in these particulars, between different leaves of Sumatran tobacco; then, if the presence of $\frac{84}{100}$ only of any given quantity duties the whole at but thirty-five cents a pound, while $\frac{85}{100}$ more than doubles the duty upon the whole, in no way can the existence of so diminutive a fraction as a one-hundredth part of the whole, possessing these requisite qualifications, be determined except by a sufficient and careful examination of the whole mass.

Hence, the very language of the statute, *ex vi termini*, requires the whole to be examined;—whether that whole be a bale or a cargo.

IV.

Store-bales insufficiently examined.

The deficient number of bales sent to the public store were inadequately examined there.

Ever since Aug. 30, 1842 (R. S. 2901) the law has required the package at the public store to be *so* opened and *so* examined as to determine the character of the contents for dutiable purposes.

It is a "true and *faithful*," and not a merely imperfect and perfunctory, discharge of this duty of examination to which the importer is entitled.

Burgess v. Converse, 2 Curt. 223.

It is an 'examination' the law requires. Webster defines this to be "a *careful* search, investigation or inquiry," etc. 2. A *process prescribed* or assigned, *for testing qualifications*."

It must be that when a particular package is sent to the Public Stores for examination, as to characteristics, differing in its several components, the whole of such package must be "*opened* and examined." The statute regulates the duty according to the presence or absence of certain characteristics; and the weight of an article that is to be counted; so that the combination of weight, numeration and quality, or other characteristic, determines the result;—hence, every article included in and making up the package must be examined, weighed and counted—otherwise the importations are not legally ascertained to possess the elements for that rate of duty which is imposed upon articles possessing them.

Even if the law and the instructions of the Secretary (valid only if in conformity therewith) permitted the examiners only to weigh selected "hands", taken from the package, yet every *leaf* in each "hand" should be so scrutinized, counted and weighed.

If it is said not to be practicable to examine every leaf in a bale, or in the selected hands, this can only mean that it would be tedious to do so, since there is no physical difficulty, much less impossibility. As Judge CURTIS noted, in the Burgess case, it may be claimed "that some goods could be fairly examined by samples drawn from packages, while others could not", etc. . . "and that the persons selected as appraisers know, or are presumed to know, what and how far they ought to examine. *This would be true, if the law had prescribed no rule on the subject.* But the section above cited has prescribed a rule which the Collector and appraisers *must* conform to."

Burgess v. Converse, 2 Curt. 222.

In that case, the defect in the examination—upon which the importers recovered at circuit and in this Court (18 How. 416)—was that sugar samples, drawn April 26, did not *fairly* represent the quality on the fourteenth of June. (2 Curt. 218.)

Here, the examination itself disclosed *some* bales of which but 70% answered the conditions of the statute. There is some considerable portion of Sumatra tobacco which does not fulfil the statutory requirements for a seventy five cents duty. As already observed, one-hundredth part may determine this question. Then, *every* hundredth part (of the selected bales, at least) must be examined to settle it.

"There was a difference in weight between the different hands examined, *in almost every instance.*" (Rec. 16, fol. 39.)

Only an indeterminate part of the deficient number of bales was looked at at all. Mr. Hamill swore that it was only

"where there was any doubt *in my mind*, I weighed them. When I found tobacco about which, in my judgment, there was no question, I did not weigh the leaves; but where there was a question, and a further examination was needed, I opened the goods, and examined the hands and the kind of tobacco. I DID NOT

DO THAT, IN EVERY INSTANCE, IN THESE THIRTY BALES. I inspected the tobacco to satisfy my judgment by opening the bales and examining the hands, and took out ten hands of every bale THAT I DEEMED IT NECESSARY TO WEIGH. If it was strictly seventy-five cents goods, it was no use to weigh it. I opened every bale of the thirty, and looked into it. *As to some of the thirty, I did not draw* ANY *hands. I* did not deem it necessary to do so." (Rec. 26, fol. 61.)

Again;—

"I *never* took out as many as twenty hands from a (any) bale, nor weighed all the hands." (Rec. 16, fol. 39.)

No man can tell how many of the thirty bales, or of our 429 bales, were 'examined' (even in this perfunctory way); nor how many hands, of the (say) 278,850 in our importation (Rec. 17 bottom); nor how many pounds, of our 76,701 pounds. *(Id.* 9, fol. 23.*)* We do know it was a very vulgar fraction. The record of the weight and number of the leaves was *non est inventus. (Id.* 16, fol. 38.*)*

Suppose (as we have just done) the bale to contain 650 hands (Rec. 17 bot.) Ten hands were drawn from *some* of these thirty bales. *(Id.* 15 bottom.*)* If from one-half of those thirty, then but 150 hands, "differing in weight, *in almost every instance*" (Rec. 16, fol. 39) out of 278, 850 were drawn; and all were dutied from these 150—exactly $\frac{1}{1853}$, instead of one-tenth!

Mr. Schroeder not only protested, but verbally told them their examination was "all wrong"; because they had not opened or examined *a single leaf* of the ten and half millions, more or less (55 Fed. R. 385) in our importation; "and there is any quantity of it (Mr. S. said) that is not suitable for wrappers, either in size or texture." (Rec. 19 bottom.)

Yet, knowing Messrs. Schroeder & Bon would challenge the legality of their action, the minute book recording it was not forthcoming, though we tried to subpœna it. (Rec. 16 middle.)

The bales are sent (R. S. sec. 2901) to be opened *and* examined; not to be opened and *not* examined, as was done in the present case.

Contrary to what the law required, and utterly disregarding the instructions of the Treasury Department (as we shall presently notice) the examiner took the *hand* as the unit of his examination; a most palpable misconception, as this is a mere mechanical contrivance upon the plantation, to facilitate the making up of the commercial bale or package.

But this theory was not carried out in a *method* (to whatsoever quantity applied) conformable to the statute.

What he did with reference to an unascertainable number of the thirty bales in store, the examiner explained by reference "for instance" to bale No. 1760, which he merely mentioned to illustrate his course, though there is naught to show he actually did anything to this particular bale. It was one of twenty constituting the lot E1. (Rec. 11 middle.) From that, or such other bale as he 'examined' after opening, he "drew out ten hands promiscuouly from the bales; weighed each hand separately, and set the weight of each down separately. I then counted the leaves of each hand, and put the number down opposite the weight." (Rec. 15 bottom.) Then because, there being 7000 grains in a pound, a pound of such uniform leaves as to be exactly alike in size and texture, so as to be severally identically the same in weight (a thing that never actually existed in nature) *would* weigh seventy grains apiece, therefore, if the quotient of dividing the weight by the number of leaves was seventy or less, he took that as proof that a hypothetical pound of such leaves—no such pound ever being gathered together or weighed—*would* contain one hundred leaves or less, and "that *hand* I would treat as dutiable at thirty-five cents." (Rec. 16 top.) If the quotient of his division was over seventy, he would say a pound of

such leaves, if put together, *would* contain more than one hundred in number; and he "would treat that *hand* as dutiable at seventy-five cents." (*Id.* 16, fol. 38.)

Then if, of the ten hands drawn, five contained *at the rate of* a hundred leaves (or less) to the pound, and the other contained more, he would duty the *entire plantation lot* (regardless of the number of bales, hands, pounds or leaves it embraced) one-half at thirty-five and the other as seventy-fives cents a pound! The law requires eighty-five per centum to incur the heavier duty. Yet, if he thus found, or conjectured, one-half of the leaf-tobacco imported (or of its hands, bales, packages or lots) to come up to the statutory standard, and the other half not, instead of letting all in at thirty-five cents a pound, he assessed seventy-five cents a pound upon half the entire quantity, whatever that might be; so no question of the proper unit affects the obvious irregularity of this course of procedure.

It was based upon a *theory* of uniformity which has no existence in fact. No two leaves are alike; no two hands just alike; no bales alike; consequently, the composition of no two pounds of leaves just alike. (Rec. 11, fol. 40; 16, fol. 39; 55 F. R. 385.)

"The number of leaves in the hand varies. Sometimes the hand contains less than twenty, sometimes more than fifty; but the general average of leaves is about thirty-five to forty. From six to seven hundred of these hands is then packed in a bale," etc. "A bale varies in weight from 160 to 190 pounds." (Blumlein case, 55 F. R. 385.)

Instead of so selecting hands as to make up a hundred leaves, and then ascertaining whether these actually *did* weigh a pound, or more, or less; or separating his ten hands 'promiscuously,' as he selected them, into piles of one hundred leaves and weighing each pile to see if it *did* weigh exactly, or more than, or less than, a pound, he weighed a hand, that would weigh (dividing the 175 pounds by the 650 hands in an average bale) say about a quarter-pound apiece, and

counted its leaves; and then constructed a suppositious pound upon this foundation, and applied it (with others similarly fabricated) to the bale from which the hands were drawn, and to the whole plantation lot of which it was but one bale. That is, he so applied it *in his mind*, and affixed divided duties accordingly.

Thus, he applied imaginary pounds to a mass of actually undivided and indivisible tobacco, which he separated into two masses only *in his mind*, and dutied them accordingly.

"There is no such regularity in the leaf as there would be in the manufactured article." (Rec. 17, fol. 40.)

This is so of all leaves, and all the growths of nature. Elgin and Waltham will turn out hundreds of thousands of movements and parts precisely alike, so that one can be substituted for another without injuring the chronometric accuracy of the watch; but natural products, of the same plant, vary with sun and shade, drought or floods, soil and culture; so the assumption of uniformity, where variety is the universal fact, *must* lead into error.

The greatly injurious effect upon us of this false hypothesis of the Examiner is seen from this proven fact, viz.;—

"that the hands containing more than a hundred leaves to the pound would *invariably* weigh less than the hands containing less than that number. The hand containing the heavier leaf weighs the most. The hand containing the lighter leaf would weigh the least. As a rule, there is about the same number of leaves to the hand, whether the leaves are light or heavy." (Rec. 19, fol. 45.)

Now; the examiner, counting the ten drawn hands finds five light, many-leaved, hands and five heavier hands, with fewer leaves; yet, he divides the 180 pound bale into imaginary halves dutying ninety pounds at seventyfive, and ninety pounds at thirty-five cents;—whereas, it is proven, that *more* than half the

weight of such a bale would be of the coarser, heavier, tobacco, dutiable at the lower rate.

This comes from dutying upon a conjectural theory, calling it an 'examination'.

V.

Treasury instructions disregarded.

It may not be very surprising that an officer who did not acknowledge the authority of law, nor regard his official obligation, should hold in contempt the view of his superiors;—but is somewhat so to find that which his action entirely ignored now set up for his protection!

The importer is not estopped by any ruling of the Secretary of the Treasury, but can bring it to a judicial scrutiny; but the subordinates in the customs' service are bound to obey, that it may be thus legally tested.

As already noted, our friend argues (His brief, p. 21) that the Collector's disregard of section 2939 was justified by the Secretary's letter of Aug. 1, 1887 (Rec. 21, 23) to the collector at El Paso; hence, a verdict should not have been directed upon that ground. But if this letter at all affected the New York customs-officers—which it might, as an instruction, without being the '*special* regulation' referred to in sec. 2939—a verdict was properly directed, because the examination therein prescribed was not made of our tobacco.

The examining officials were bound to make *such* an examination as the Secretary of the Treasury directed, under *his* construction of this law, leaving the importer to litigate in the Courts the correctness of this construction.

Section 2652. It shall be the duty of all officers of the customs to execute and carry into effect all in-

structions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury shall be conclusive and binding *upon all officers of the customs.*

See also Section 249.

"The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports and tonnage, as he shall judge best."

His specific instructions upon the subject of examining leaf tobacco, under the act of 1883, are found in this letter of August 1, 1887 (ss. 8368) in force when our goods were imported and dutied.

He there expressly directs the adoption of the *leaf* as the unit:—

"The language of the paragraph would not seem to leave much room for doubt in this respect. The subject of the tax is "leaf tobacco", not "bales" or "hands" or "packages" of leaf tobacco, and the liability to duty cannot be made to depend upon the form of the package in which the importation is made.

Every *leaf* 85 per cent of which is suitable for wrappers, and the weight of which is such that more than one hundred *such* leaves *would* be required to weigh a pound, is declared to be liable to the high rate of duty. This view is further strengthened by the provision in the paragraph that in determining the weight *the individual leaves alone are to be regarded.* The *weight is not to be determined by hands*, or packages, or bales, but by leaves." . . . (Rec. 22, fol. 51.)

"It has been suggested that it would be difficult, if not impracticable, for *the appraiser to adopt the leaf as a unit*, but it is not believed that such an objection rests upon tenable grounds." . . . (Rec. 22, fol. 52.)

"*If it is the practice to regard the hand*, or package, as the unit, and in case 85% of *it* is not found to be of light weight and suitable for wrappers, then to regard the whole importation as dutiable at thirty-five cents per pound, I think such practice is *not* in accordance with the intent of the law, and *should be* discontinued." (Rec. 23, fol. 53.)

The El Paso collector had assessed *all* of B. Weyl's tobacco at seventy-five cents a pound. (Rec. 21, fol. 50.)

The Baltimore collector and appraiser, to whom the matter was referred, examined *the leaves* in the submitted samples and found fifty-nine out of *every* one hundred leaves of the requisite size, fineness and weight; whereupon they (rightly) agreed that the whole invoice was dutiable at thirty-five cents a pound. (Rec. 21, 22.)

From this conclusion the Secretary (wrongly) dissented; mentally dividing the one thing imported into two entities (which never really existed) one—being $\frac{59}{100}$ of the importation—composed of leaves every one of which answered the statutory description, which he dutied at seventy-five cents a pound, and the other—being $\frac{41}{100}$ of the importation, and composed wholly of leaves not answering this description—he dutied at thirty-five cents a pound. (Rec. 23.)

Though we think this wrong, and have a right to, the customs-officers were bound by these instructions.

Not the slightest attempt at compliance was made by these officers in our case.

The ten hands were to be drawn that *every leaf* in every such hand should be subjected to separate scrutiny; and *no one* of our hands was untied, nor aught but a count (as making one of a multitude) made of a solitary leaf of our tobacco! (Rec. 16, fol. 39.)

The "second" claim of our protest (Rec. 13 top) claimed the leaf as the unit; and the "eighth" (*Id.* 13 bottom) that not 85% of our leaves had the requisite fineness and lightness.

Mr. Schroeder told Messrs. Sturges and Hammill their examination was "all wrong." "*You have not examined or opened a single leaf of* this tobacco, and *there is any quantity* of *it that is not suitable for wrappers*, either in *size* or *texture*." (Rec. 19 bottom.)

Their answer was;—"*We cannot go into that. . . We don't examine* ANY *leaves* here. Your manufacturers do that." (Rec. 20 top.)

" Of course " Mr. Schroeder " disagreed with them." *(Ibid.)*

They refused to do the very thing enjoined in the Secretary's letter of Aug. 1, 1887, ss. 8368, although the statement that the manufacturers do it, showed its practicability ; and a government witness testified that it could be done without injury by a sufficient expenditure of money and care to do it properly. (Rec. 28, fol. 66.)

Our own opinion, *quantum valebat*, has already been expressed, that the usual commercial package is the unit *(ante*, pp. 30, 31*)* ; but the examining officers should have accepted the leaf-unit.

The Attorney-General (Brief, 24) considers " that Asst. Secy. Maynard *correctly* interpreted the statute." Then a so-called ' examination ' which set this ' correct ' interpretation at defiance cannot justify the imposition of the heavy duty upon our unexamined leaves.

The fallacy in Mr. Maynard's reasoning is, treating the term " leaf-tobacco " as though it read ' leaves of tobacco.'

Leaf-tobacco, the Century Dictionary says, and common observation teaches us, means merely unmanufactured tobacco ; " tobacco in the form of leaves," as the Imperial Dictionary defines it.

In this statute, it is used as a noun of quantity or multitude ; not of unity, as to the individual leaves.

But, if the Court agrees with the then and the now Attorney-General, that Mr. Maynard's contrary view was the correct one, our protest and claim preserves our right to profit by such a conclusion.

We neither waive nor forfeit our right to the protection of the law, correctly construed, by declaring our preference for one over another of several suggested constructions.

If the leaf was the true unit, then we claim the benefit of the failure to examine the leaf, when we expressly insisted it ought to be examined ; and that such examination would vindicate our claim to import at the lower rate.

VI.

Pretexts to justify disregard of law and instructions.

I. It is pretended that the failure to send the required number of bales was at the request of the importers; "when it further appears that the importers *actually* requested the examination of *a less number* than were being examined," etc. (Gov't. Br. p. 22.)

As to these defendants in error, this statement is absolutely without foundation. *They* never made any such request, 'actually' or constructively. If any other importer, anywhere from the Rio Grande to the St. Lawrence, ever made *such* request, this record does offer a scintilla of evidence of that immaterial circumstance.

II. To the *theory* that, by not objecting, we 'waived' the benefit of section 2939 (Same brief, p. 22) we oppose the *fact*, of record, that we *did* object; at exactly the time, and in precisely the form, prescribed to us by law for stating such an objection. (Rec. 12, fol. 30; 14, 'eleventh.')

The liquidation was Jan. 25, 1889 *(Id.* 14, bottom*)*; the protest Jan 29, 1889 *(Id.* 12, fol. 30*)*; and it was not until the next May that our tobacco was taken from the government ware-house *(Id.* 11, bottom*)*; during all which time this specifically-stated objection could have been obviated—and was not.

If *this* be a 'waiver,' we do not know what would be an insisting upon one's statutory rights.

III. It is said (same br. 4) that one of the ten bales in question, No. 1564 was "*actually* examined at the public stores"—an affirmation pregnant with the admission that no other was *so* examined; then, again, it is said (at p. 22) to be admitted "that the bales actually examined are a fair sample of the whole lot."

Suppose we concede that No. 1564 was "actually examined"; as one of our ten bales: still, by that examination, it appeared that but 70%, instead of 85%, possessed the statutory characteristics (Rec. 11 top); yet we had to pay the higher duty upon seven-tenths of this bale, and upon those it was assumed to represent. *It was treated as a unit for examination, and as a double for assessment of duty!*

It was 70% of these *bales* and 30% of these *bales* that the appraiser and examiner returned. Then the *bale* was by them treated as a unit, though they claimed to determine dutiable 'hands'; but the collector assessed a higher duty than such return to him warranted.

If it is fair to *infer* from these figures that bale No. 1524 was examined, it is equally so to infer that those returned all at seventy-five cents were *not*, because Messrs. Sturges and Hammill were not in doubt.

There is nothing to show that either of the five bales sent by the collector originally was ever examined, actually or constructively. Yet *he* had the right to, and did, by the very act of designation, require them to be examined "according to law." The Appraiser could call for more, and did; but after he had signified to the Collector the existence of the statutory necessity, and the Collector had acted thereon, by a further designation, the examiner and appraiser were just as much bound to examine the additional bales, as they were the original five. The Collector had then equally designated them *all* "to be opened and examined."

What ones were examined the record does not tell. The book which would, the examiner fails to produce.

That only ten bales are now included in this suit, and that No. 1524 happens to be one of this spared remnant of our original 429 bales (Govt. Brief, p. 2) is a circumstance of no significance. It is a mere "fortuitous concurrence of accidental atoms;"—the accident of an accident, unworthy of further notice.

IV. The pretext that the course adopted, in violation of law and of treasury instruction, was pursued solely out of a tender regard for the interests of the merchants who protested against it is the most absurd of all.

True, the examiner, pushed by the U. S. Atty. upon cross-examination, gives this excuse for neglected duty; "Every hand that is drawn injures the bale, more or *less*" (Rec. 16; Gov't. Br., pp. 6); but no merchant said so, and it was proved that hands were drawn for any prospective purchaser. (Rec. 18, top.)

Let us see what probability attaches to this excuse. Take bales 1706 to 1754, fortynine in number, marked S. B. (Rec. 11.) The average dutiable value of each is $173. *(Id. 9.)* The average weight about 180 pounds *(Ib.)*; so its cost, exclusive of duty, does not vary far from a dollar a pound; say, $8,820 for these forty-nine bales. One bale, representing the whole plantation, goes to the public store; and the examiner is so afraid he shall do "more or less" injury to this $173 bale, if he draws a few hands from it, that he just assesses seventy-five cents a pound, $6,605 upon the whole lot, instead of $3,087. He fears the merchant would not want the $173 bale hurt in the least, in order to see if this difference of $3,518, or some portion of it, cannot be saved to him!

V. Another deceptive phrase, found in Mr. Maynard's letter (Rec. 22, fol. 52) and reproduced in the Attorney-General's brief (pp. 24, 26, 29) is that which assumes there was some deliberate act of *mixing* different kinds of tobacco for importation here. Especially as presented in the government's brief is this idea fallacious, misleading, and without the slightest support in the testimony.

To mix, in the sense imputed, implies a designed compounding, to a greater or less degree, of articles commercially, or otherwise, distinct, and dealt in by importers and wholesalers as different commodities, like Havana and Sumatra tobacco, etc. Our goods were

properly packed in the usual way, in Sumatra, and to sell here or elsewhere just as they were put up there. The natives upon this Sumatran plantation, if they knew of our existence, could know nothing of our laws; and, when they stripped off and put up their crop for shipment, could not even hazard a conjecture whether this fragrant weed would be burned by the Dutch burghers to whom it was originally shipped, or by cockneys, or German students, or any other of the "dwellers beyond the great sea." It was *not* "mixed." It was gathered and put up as an entity; so shipped to Holland, and thence to New York; so sold, in the ordinary course of business here;—hence, to be so treated as a dutiable, as it was as a mercantile, commodity.

"No two leaves are alike"; hence, some possess a lightness, fineness and superficies greater than others; —but this was the very thing contemplated by the Statute as certain, or likely, to happen—that, in every imported quantity, there would be a percentage over, equal to, or under $\frac{85}{100}$ and $\frac{15}{100}$, possessing these valuable attributes to a higher degree than the other leaves of the same plant or plantation.

The leaves possessing and those lacking the statutory qualifications were no more mixed together than were the several leaves of the superior, or of the inferior, availability, mixed with each other.

All constituted one homogeneous mass, so far as all commercial dealing was concerned; all of the "one species of leaf constituting a known article of commerce". (Atty. G's. Br. p. 24.)

If our legislation offers extra inducements to the importation of inferior qualities, like dark sugar, etc., it would be surprising if the demand thus created was not met; as by sugar purposely made dark, or powdered; in which supply of our demands, there is "no evasion, and no fraud".

U. S. v. Breed, 1 Sumn. 165-6.
Merritt v. Welsh, 104 U. S. 701.
U. S. v. 112 casks, 8 Pet. 280.

In the present case however there was only the ordinary Sumatran bales, sent to the great mart, Amsterdam, for him to buy who would, come from what quarter of the globe he might. The swarthy Malayan plantation-hand, "sweltering 'neath the line", did not stop, as he tied the leaves into hands, to apply any $\frac{85}{100}$ rule to their separate qualities, upon a remote contingency that they might ultimately go to the only country attempting this absurd discrimination.

VI. This calls to mind another flimsy excuse offered to palliate the customs-officers' disobedience of law and of instructions, viz.; that their so-called examination, though not compliant with these mandates, was such as were ordinarily made in commercial dealings in this article.

This is not so; for purchasers take samples, 'case' them, etc. (Rec. 18 top.)

If true, it would be immaterial; because the two examinations are not directed toward the same end; that of the customer being only intended to ascertain general qualities, while that of the customs-officer *should* have been to determine the *precise* percentage of specified qualities, and the exact weight of a hundred leaves.

The truth is forcibly stated in this paragraph of the Blumlein brief:—

"It is clear that the whole scheme of the appraiser involved, first, the examination of as little tobacco as possible; second, the examination of that little in as easy and slovenly a manner as possible; and, third, the adoption of the easiest and most unfair method of applying the results of the examination. We submit that such proceedings furnish no rational or legal basis for the doubling of taxes."

VII. The difficulty which the Attorney-General naturally experiences in defending the indefensible is shown by his referring to R. S. sec. 2910 as having the

slightest bearing upon the present controversy. (His brief, p. 30.)

As matter of *law*, this section relates to *ad valorem* dutied goods; where the rate attaches to the value, as such; the word 'value' meaning the *foreign* market-value. (R. S. sec. 2952, which with sec. 2910 constituted sec. 32 of the act of Mar. 2, 1861—12 Stats. 197—broken into these two in the revision); and no different values in the foreign market attaches to different leaves of the same bale.

As matter of *fact*, no "different values" attach to any portion of a bale, sold as one article of sale and purchase. A large leaf will wrap more cigars than a small one; but *non constat* that 180 pounds of smaller leaves will not wrap as many as 180 pounds of larger leaves. A pound of feathers is as heavy as a pound of lead.

This is a mere re-production of the fallacy of mixed *lots* (Atty. G. Br. 15 mid.) in a bale. The two "lots" is a figment of the official imagination. A bag of beans is a bag of beans, whether of uniform or of different sizes.

In the connection in which the expression is employed (Collr's Br. p. 29) it is as fallacious to speak of our tobacco as 'separable' as it is to treat it as 'mixed.'

Commercially speaking, and as applied to an importation, to be sold by the importer, it is practically one inseparable bale; and it is with reference to *such* dealings that tariff laws are framed. And this clause of the statute, with which we are concerned, did not treat of the *separability* of a hand, or bale, or quantity, of a given lot, but of its *unity* and *proportionate* composition.

The position that the commercial unit *must* be the congressional unit *(Ib.)* results from considering the article *as an importation*, in the condition in which the prescribed duty attaches itself thereto.

The language of the Falk case (137 U. S. 225) is clear enough *as applied to the facts* in relation to which it was uttered; but do not apply to a case in which there is no actual separation.

The theory of a "Congressional unit" of *hands* is untenable; but would not help the collector in this case, if maintained; because, though the examiner set down one "hand" as seventyfive and another at thirty-five cent tobacco, he only did that as a method of assessing *bales* according to the number of *pounds* they contained.

He theoretically (and practically so far as the exaction of duty is concerned) divided our *bales* (according to plantation origin) into two; if one bale or fifty were withdrawn, it was by paying two different rates upon the same mercantile package!

We deny absolutely that it is right, by a mere theoretical assortment or division of our tobacco (in the mind of the customs officer) *into two parts, to subject it to two rates of duty; it remaining in fact, and as a merchantable commodity, one commercially inseparable and actually unseparated lot of tobacco.*

In his "torture" of the statutory language (Atty. G.'s Br. 25) in the Blumlein case, Judge WHEELER (49 F. R. 233 top) observes that, if the collector's way "was the way this was to be done, this law ought to read, 'seventy-five cents on as many pounds of the whole as the per cent of tobacco of the requisite lightness makes';—which is obviously *not* the meaning of the act.

That is the way *he* "tortures" the act.

VII.

Statute, and its requirements.

This statute is not expressly directed against Sumatra tobacco.

Legislation so directed would violate "the most-favored-nation" clause of our treaty with the Netherlands.

While it is true, Congress has the *power* to legislate in contravention of treaty stipulations, it is equally so that no such purpose can be inferentially deduced, but must be explicitly exercised to be judicially recognized. As our own statutes cannot be annulled by implication, except it be an imperative necessity of the language employed (137 U. S. 686) still more must this canon be applicable to treaties which good-faith requires us to observe. A treaty is 'a contract between two nations', as well as 'the law of the land' over their citizens. (2 Pet. 314; 6 Wh. 72; 112 U. S. 598; 119 *Id.* 418; 130 *Id.* 600.) Either contracting party may violate the contract, as an individual may his, and be amenable only to moral condemnation or the arbitrament of war; yet a purpose to do so cannot be imputed where it is not absolutely expressed; but the statute and treaty will be so construed as to harmonize, if possible.

Whitney v. Robertson, 124 U. S. 194.

"Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the *latter* is to be preferred. Shanks v. Dupont, 3 Pet. 242. Such is the settled rule in this Court."

Hauenstein v. Lynham, 100 U. S. 487.

This is equally true of a statute assuming to burden a citizen with onerous taxation; especially as to goods protected from inequality by treaty stipulations.

Accordingly, in the Falk case, when it was suggested, upon the part of the Attorney-General, that Congress specially aimed this clause of the act at Sumatra tobacco, but was restrained from saying so expressly by regard to treaty obligations, the late Justice BRADLEY interjected the comment;—"Then you expect this Court to sustain a breach of good-faith, though Congress purposely refrained from giving their statutory declaration in language explicitly requiring it."

Some senators did express in debate a desire, *if it could be done* WITHOUT *infringing treaty stipulations* (and not otherwise) to discriminate against Sumatra tobacco:—but the experienced senator from Ohio (MR. SHERMAN) doubted 'very much' whether this clause, as enacted, would accomplish any such purpose.

14 Cong. Rec., Pt. II, pp. 1897–1906; 2564; 2567–8, etc.

It is not surprising that, before the Courts, indirection fails to accomplish a discreditable purpose, if it was hoped by some that it could be so attained.

This statute, then, affixed a duty to *all* 'leaf-tobacco,' regardless of the country of production, and from wheresoever imported.

It prescribed that thirty-five cents a pound should be levied upon all such tobacco; unless found, *by the requisite examination*, to possess those peculiar characteristics mentioned which would justify the imposition of a higher rate.

This rate (35 cents a pound) generally attributable to all unmanufactured and not stemmed leaf-tobacco, not duly ascertained to have the specified properties, was precisely that to which all unmanufactured and not stemmed leaf-tobacco was subject by pre-existing legislation.

R. S. (2d ed.) p. 469 bottom.
Act, June 30, 1864, (13 Stats. 203.)

This act of 1883 introduced an exception. It carved

out of the general subject, 'tobacco in leaf,' a subordinate class of such tobacco, to wit ;—that found, upon proper examination, to possess a definite proportion of '*requisite* size,' '*necessary* fineness of texture,' to render it 'suitable for wrappers,' and of such lightness or thinness that 'more than a hundred leaves are required to weigh a pound' ; "and *those who set up any such exception* must establish it," etc.

U. S. v. Dickson, 15 Pet. 175.
Roberts vs. Yarboro, 41 Tex. 452.
Clark's Ap. 58 Conn. 209 bot.

The Attorney-General (Br. 26 bot.) refers to the canon of construction that the mischief to be remedied must be considered. True ; but it never was a matter of common, nor of judicial, cognizance that the admission (conformably to solemn stipulations) of Sumatra tobacco upon the same terms as that of all other countries had become such a mischief as ought to be legislatively remedied, regardless of good faith. Even by resort to reported debates, we only find that, while some thought this tobacco could be alone discriminated against by this craftily-devised clause, the wiser and more experienced doubted it ;—and all agreed it should be affected *only just so far as the natural meaning of the terms employed and the actual possession of the designated qualities should, in their application to each several importation of the article, be practically found to affect it.*

Even if the intent imputed by the collector could be discovered in this law, it would then call for the strictest, instead of latitudinous, construction ;—as trenching upon treaty rights and discriminating against a friendly nation, to impose onerous burdens and restrictions upon our own people ; hindering, instead of fostering "an honorable commerce." (9 How. 635.)

There is nothing just or equitable about this Statute. It is, like many tariff provisions, a bald exercise of power, to be literally obeyed. Its command is '*Sic volo, sic jubeo ;*—like the clauses in earlier laws that

all hats costing less than ninety-one cents should be *deemed* to have cost $1 (4 Stats. 26); or that woolen goods whose *actual* value was over half-a-dollar, and *less* than $1, shall be deemed to have cost $1; *actual* value over $1, and less than $2½, deemed to cost $2.50; exceeding $2.50, etc., deemed to cost $4; and *ad valorem* duties (45%) charged thereon accordingly. (*Ib.* 271.)

There is nothing *equitable* about such enactments, to liberalize construction; they are strict law, to be enforced accordingly.

There is nothing upon the face of the act itself disclosing any such purpose as is now imputed to it; and it must be construed, and the legislative intent therein discovered, according to the meaning of the language employed.

Legislators, as "men *whose intentions require no concealment*, generally employ the words which most *aptly* and *directly* express the idea they intend to convey."

Gibbons vs. Ogden, 9 Wh. 188.
Newell vs. Peo. 7 N. Y. 119 top.
Ritter vs. Ritter, 39 Pa. 398 bot.

"Of all our statutes, those which are for the enforcement of taxes ought to be expressed with the greatest clearness and simplicity. Individuals cannot meet the Crown as they can do each other. There is no department of the law in which the subject is more jealous of his rights—more suspicious—more prompt to be excited by the smallest symptom of injustice—and more resolute, before yielding willing obedience, to know how, and by whese authority he is charged." 84 Edb. Rev. July, 1846, p. 131.

Hartranft v. Wiegmann, 121 U. S. 616.
Adams v. Bancroft, 3 Sumn. 387.
Girr v. Scudds, 11 Exch. 191.

COCKBURN, C. J. "We must consider what the acts of Parliament *actually say*, and not enter upon some remote speculation as to what the legislature intended.

Palmer v. Thatcher, 3 Q. B. D. 353.

Coxhead v. Mullis, 3 C. P. D. 442.
Jones v. Smart, 1 T. R. 44.
Everett v. Wells, 2 M. & Gr. 277.
Logan v. Earl, 13 Beav. 29.

It is not the *intention* of the legislator that constitutes the law, but *the words in which he has permitted that intention to be expressed.* His views and designs cannot be matter of inquiry; and if by any accident he has sanctioned a law which the judge interprets in a manner directly the reverse of that in which the legislator understood it, it must be so put in execution; for *the public have a vested interest in the law as it stands.* (84 Ed. C. Rev. 117.)

LOWRIE, C. J. "The legislature certainly have no such authority over us as to change the laws of language. *If given language does not convey a given meaning, they can give us other that does; but this will not change the meaning of the former language.* In the very nature of language, that is impossible. . . . . The meaning of the law being the law itself, the law can be no older than the *effectual* expression of it." . . . . (39 Pa. St. 144.)

After observing that, to sustain plaintiff's contention in that case would be to violate the plainest principles of interpretation, the chief-justice added;—

"It expresses no such thing; and the act of 1859 cannot change its nature.

"Arbitrary interpretation is no interpretation at all; but only substitution of one man's language and meaning in place of the language and meaning of another. True interpretation is the ascertainment of another's meaning from *his expressions*, not from our thoughts and wishes."

Reiser v. Wm. Tell, 39 Pa. St. 144.

"Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating, we should legislate. That we have no power to do. Our function is to execute the law, not to make it.

Poor v. Considine, 6 Wall. 480 top.

Chief Justice MARSHALL's expression was; "The law is the best expositor of itself."

Pennington v. Coxe, 2 Cr. 52.
Henderson, 14 Wall. 68 top.

A later expression of the same idea was;

"This is a legislative act, and is to be interpreted according to the intention of the legislature, *apparent upon its face.*"

Wilkinson v. Leland, 2 Pet. *662.
U. S. v. Fisher, 109 U. S. 145.
Charles v. Warren, 11 Pet. 544.
Aldridge v. Williams, 3 How. 24.
Butler v. Leibold, 107 Pa. St. 407.

There is no propriety in assuming this act to be specially directed toward Sumatra tobacco and then making that assumption, which finds no support in the text, the ground for a construction beyond the ordinrry meaning and implication of the language employed.

Even where the character of the legislation was apparent upon its face, the courts have deemed it improper to add a single word to its language, to make it effective or reasonable.

"It is not for courts of justice, *proprio marte*, to provide for all the defects or mischiefs of imperfect legislation."

Smith vs. Rines, 2 Sumn., 355.

TINDAL, C. J. "I do not see how we can put the construction upon this act which we are called upon to do, without adding to it a distinct and substantive provision."

MAULE, J. "The argument on the part of the defendants seeks to introduce into the act a proviso which is not found there."

Everett vs. Wells, 2 M. & Gr. 276, 278.
Jones v. Smart, 1 T. R. 44.

It is not our place to supply defective enactments by an attempt to carry out fully the purposes which may be *supposed* to have occasioned these enactments. This

would be an assumption by the judicial of the duties of the legislative department. It may often be quite uncertain, as it is in this instance, to what extent and in what manner, if any, it was designed they should be carried out."

Swift v. Luce, 27 Me. 286 bot.

To a single brief independent clause, like this, of four or five lines, the language of the Maryland (and other) courts is peculiarly applicable;—

"Courts cannot *imagine* an intent, and bind the letter of the act to it.

Alex. v. Worthington, 5 Md. 472.
Maxwell v. St. 40 Id. 293.
Smith v. State, 66 *Id.* 217 bot.
Hyatt v. Taylor, 42 N. Y. 261–2.
Frye v. R. R. 73 Ills. 403 top.
Woodbury v. Berry, 18 Ohio, 462.

The exposition of the statute contended for by the government

"assumes that the legislature adopted a form of expression quite inappropriate to convey their real meaning, while the subject was unembarrassed by any difficulty in selecting words which would express their intent explicity and clearly."

Leoni v. Taylor, 20 Mich. 154.

If 'Sumatra' were the real meaning of the descriptive circumlocution of this statute, the only embarrassment connected with the selection of that word was its impinging a treaty of which Congress did not wish to avow a disregard: and this Court will hardly assume that responsibility to extricate the matter from any *such* embarrassment.

Whatever leaf-tobacco this law may be aimed at, *none can be hit* by its higher duty *except such as an examination*, directed toward that end, *ascertains to possess those qualities* (whatever they may be) *to which the greater rate attaches* itself as a consequence. Without

such examination and ascertainment, only the lower rate is leviable.

The Attorney-General (Br. 28 bottom) conceives that the Senators were struggling to define "a new article of commerce", although leaf-tobacco is far from new, since "leaf-tobacco" and "tobacco, unmanufactured" had been specified for forty years or more.

If they meant to discriminate against any leaf, by imposing a higher duty upon its importation, it was *only* against that 'of which' eighty-five per cent possessed certain qualities ours is not shown to possess.

The Attorney-General adds *(Ibid.)* "The abandonment of the bale as a unit of quantity is significant".

He assumes the *fact* of abandonment to be as axiomatic as a proposition of Euclid, though able and eminent jurists have declared it was *not* abandoned.

How was it abandoned? How ever established, except by acquiescence in commercial usage? There is not a line to show that "leaf-tobacco" was to be treated any differently, as to what constituted its unit-package, than any other merchandize.

But there must be some unit; *something* repre ented by 100 to which 85 parts thereof *must* have relation; *some* integer for the fraction.

If Congress abandoned the bale, or commercial package, as a unit, what other image of anything that is in the Heavens above, or earth beneath, or in the waters that are under the earth, did they set up in its place?

As to *some* unit, this statutory provision contemplates size, texture and weight, each and all, as attributes of the *same* unit. Whether a bale or a cargo, that to which the scrutiny as to *size* is directed (to determine relative proportions) must be the subject of examination as to *texture* and as to *weight*, or thinness.

Taking these qualities in their statutory sequence—if, of a bale or a cargo (or any "given lot") 85% is *not* of the requisite *size*, the whole bale, or cargo, or "lot"

pays but 35 cents a pound; so if $\frac{85}{100}$ of the *same* unit be not of sufficient fineness; or lightness. The test of fineness must be applied to the *whole* integer—not merely to that fraction which passes muster as to *size*. So the test of weight or lightness, is applicable to the same total; not merely to that fractional part of it found to be sufficiently large and fine.

For example; if the leaf were the unit (as counsel argue) each leaf must be scrutinized as to size and fineness, and the existence or absence of defects; then a count is easily kept of them; and, if the bale contain 17,500 leaves the duty is 35 cents a pound, if it weigh 175 pounds or less; and 75 cents a pound, if the bale weigh more than 175 pounds.

Eighty-five per cent of *something—some* mass, *some* quantity, set apart from all other in its importation—is to be ascertained; and this something must be decided upon and taken in hand for examination, before you apply either standard; and to it must all the tests be applied. Congress designed that any 'given lot' which shall become the subject of one examination for classification shall pay (as an entity) either 75 cents or 35 cents, according to proportions developed by that examination. If a portion be rejected as of insufficient *size*, it will not do to apply the second test (of fineness) to those leaves only which were found sufficiently large;—and the same is true as to weight;—otherwise, the total might be burdened with the larger duty, though much more than fifteen per cent. of the whole was found not within the description of leaf-tobacco so chargeable.

The Attorney-General (Br. 24 bottom) repeats the argument of his subordinate in the Blumlein case, that the percentage does not apply to weight. We shall meet that by an adaptation to this record of the reply made to this position by Mr. Blumlein's counsel.

If the 85 per cent. clause does not relate to the weight, then the statute must be construed to read as as follows:

Leaf tobacco. { *(a)* of which 85 per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers. *(b)* of which more than one hundred leaves are required to weigh a pound.

As the Attorney General now insists (Br. 24 bottom.) that these are co-ordinate qualifications—and that "The percentage has nothing to do with the weight—we may disregard, for the time being, the first of them, and it will then appear that the 75 cent duty is assessable on leaf tobacco of which "more than one hundred leaves are required to weigh a pound". And we respectfully submit that, if the statute read thus, no tobacco would be dutiable under it unless substantially one hundred per cent. of it weighed more than one hundred leaves to the pound. The phrase "leaf tobacco of which more than one hundred leaves are required to weigh a pound" cannot, we contend, be applied to tobacco of which (to take the most extreme case against us on this record) only 78 per cent. answers that description. (Rec. 18, fol. 42.) It cannot be supposed that in a homogeneous mass of tobacco, packed just as it was picked on the plantation, Congress meant one part to pay thirty-five cents duty and another more than twice that duty, depending on the accidental weight of hands selected at random."

The whole of my opponent's argument recognizes the absolute necessity for *some* unit, as to which percentage is to be calculated. If there be none, there is nothing to which the law can attach; and the same is true, if the unit cannot be explicitly declared and ascertained, in cases to which it is sought to apply it. The law must fail from sheer inability to execute its provisions. It cannot justify the doing of something which these provisions exclude.

The only difficulty upon this subject has arisen from the assumption of the existence of a congressional pur-

pose which was not avowed, and which this law it is said sometimes fails to accomplish; but the results of our case, the Blumlein, and the Soby, cases are in harmony with the 85% rule, which the law does avow and establish.

REDFIELD, J. "It seems to us that, aside from the *private history* of this statute, no one would have given to it any more extended operation than the one here given it. If the legislature desire to pass a law making persons liable as trustees in cases like the present, it is a very easy matter to do so. But if they are too delicate, or too timid, to do it *in so many words*, or, *for any other reason, do not choose to do it, we do not choose to do it for them.* We choose to have a *law* upon this subject, and then we will enforce it, *if we can.* But it is enough *for us* to enforce such laws as are made to our hands, without usurping the proper functions of the legislature."

Barker v. Esty, 19 Vt. 140–1.
Steere v. Bromwell, 120 Ills. 31.
Maxwell v. St. 89 Ala. 161.

"Those who used the words thought they had effected the purpose intended; but we, looking at the words as judges are no more justified in introducing *that* meaning than if we added any other provision."

Green v. Wood, 7 Q. B. 185.
McConnv. v. Jy. Cy., 39 N. J. L., 38.
Ward v. Ward, 37 Texas, 89.

If this statute sometimes led to an absurd, instead of an unexpected, result that would be no ground for a forced construction.

"It has been repeatedly held, if the plain words of a statute lead to an absurd result, that is not any reason for changing the natural interpretation of the words employed."

Pa. v. Pittsburgh, 104 Pa. 547.
Frye v. Chicago, 73 Ills. 399.
Stratton v. Pettit, 16 C. B. 432,

Where MAULE, J., observed that the law was "incongruous and impossible of operation, and its absurdities

so great that the framers themselves had no very distinct notion of its meaning."

"If we find language incapable of a meaning, we cannot supply one."

Green v. Wood, 7 Q. B. 185–6.

"The law must remain as in was, unless that which professes to change it be itself intelligible."

Drake v. Drake, 4 Dev. 110.

The statement upon p. 28 of the Attorney-General's brief, that this clause was drawn by a tobacco-manufacturer, may explain why it is not clearly expressed.

Lord Coke speaks of Acts of Parliament "many times *on a sudden penned* and corrected, by men of none, or very little judgment *in the law*."

In the present instance, however, there was not so much mistake or carelessness in terminology; but a mistake of *fact*. The importation of leaf-tobacco from Sumatra was a new undertaking; the nature of the product was not fully understood; a too hasty generalization, from the few instances brought to the attention of the draftsman, led him to infer that no tobacco grown in that island, and imported in any form, package, shape or quantity, could be found or entered of which more than one hundred leaves would not be required to weigh a pound, if of proper size and texture for wrappers; but this case, and others, indicate that soil, season, fertilizer, time and chance in every phase, may and does produce Sumatra tobacco entitled under this law to entry at the lower rate of duty.

Of this class is our importation of leaf-tobacco.